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In the Supreme Court of the United States

October Term 1985

CHARLES H. GRUBB

Respondent,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Did the Court of Appeals misapprehend and misapply the clearly erroneous standard, as construed by this Court in *Anderson* v. *City of Bessemer City*, when it summarily vacated its prior reversal of the district court's finding of race discrimination, particularly where the initial reversal was premised upon the objective ascertainment of undisputably erroneous factual and credibility findings?

2. Did the Court of Appeals err in affirming the district court's award of back pay and post-judgment remedies for the period subsequent to the plaintiff's voluntary termination of comparable employment, where the district court found that the plaintiff had elected early retirement under the Social Security system?

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Petitioner, W. A. Foote Memorial Hospital, Inc., respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 16, 1985.

OPINIONS BELOW

1. The second decision of the Court of Appeals (*"Grubb II"*) is reported at 759 F.2d 546, and is set out at pp. H-1 to H-4 of the Appendix.
2. The initial decision of the Court of Appeals (*"Grubb I"*) is reported at 741 F.2d 1486, and is set out at pp. E-1 to E-34 of the Appendix.
3. The district court's Opinion and Order Granting Judgment in Favor of Plaintiff is reported at 533 F.Supp. 671, and is set out at pp. A-1 to A-14 of the Appendix.

4. The district court's Memorandum Opinion and Order on Damages, dated February 4, 1982, which is not reported is set out at pp. B-1 to B-3 of the Appendix.

5. The district court's Memorandum Opinion and Order on Damages Issues, dated April 29, 1982, which is not reported is set out at pp. C-1 to C-4 of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on April 16, 1985. A timely petition for rehearing was filed, which was denied on June 7, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, sex, or national origin.

Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(g) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable to the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

STATEMENT OF THE CASE

This petition arises out of an employment discrimination claim brought by Charles H. Grubb, against W.A. Foote Memorial Hospital, Inc. (''Foote Memorial''), subsequent to Foote Memorial's budgetary elimination of his assistant laundry director position. On February 20, 1979, Mr. Grubb commenced this action in the United States District Court for the Eastern District of Michigan, alleging that the elimination of his position and consequent termination of his employment with Foote Memorial constituted race and age-based discrimination, as well as the breach of an implied contract of employment, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, The Civil Rights Act of 1870, 42 U.S.C. §1981, The Age Discrimination in Employment Act, 29 U.S.C. §§621 *et seq.* (''ADEA''); the Elliot Larsen Civil Rights Act, Mich. Comp. Laws §§37.2101 *et seq.* and Michigan common law.

Subsequent to a trial without a jury in June 1981, United States District Judge Patricia J. Boyle found for Mr. Grubb on his race discrimination claim and found for Foote Memorial on the age discrimination and implied contract claims.

a. Background of Claim

Certain facts surrounding the termination of Mr. Grubb's position were not disputed at trial. In 1975, Foote Memorial purchased the Sisters of Mercy Hospital in Jackson, Michigan. Thereafter, the Sisters of Mercy Hospital was known as ''Foote West'', while Foote Memorial's original facility became known as ''Foote East''. Prior to the acquisition, the Sisters of Mercy Hospital employed Mr. Grubb as its laundry manager. The hospital also employed Mrs. Rosella Fountain as Mr. Grubb's laundry supervisor, with responsibilities for on-line supervision such as sorting, packaging and scheduling. At that time, Mr. Willard Carl was the laundry manager for Foote Memorial.

Subsequent to an administrative consolidation of Foote East and Foote West, a Laundry Committee was formed to study and make recommendations concerning a consolidation of the laundries at the two facilities. In December 1975, the committee recommended that the two laundries be physically consolidated at Foote East with one laundry manager, one assistant manager and an elimination of the supervisor position held by Mrs. Fountian. Mr. Carl was appointed director of the combined laundries in March 1976 and Mr. Grubb was designated as assistant director. Both prior and subsequent to the appointments, Mr. Grubb continued to manage the laundry facility at Foote West assisted by Mrs. Fountain, whose laundry supervisor position was never eliminated.

In February, 1977, Mr. Carl proposed a laundry budget for 1978–79, in which he recommended the elimination of the assistant director position and retention of the laundry supervisor position upon the scheduled physical consolidation of the two laundries at Foote East in the summer of 1977. When asked by his immediate supervisor about his reasons for abolishing the assistant director position, Mr. Carl replied that Mrs. Fountain was more cooperative, had longer years of laundry service, worked better with the laundry workers and that they needed a working supervisor who would be willing to "pitch in" occasionally to help with the laundering work. Mr. Carl also explained that there wasn't a place for Mr. Grubb.

Although Mr. Carl advised Mrs. Fountain before April, 1977 that her position would be retained, he did not inform Mr. Grubb until July 10, 1977 that his assistant director position had been eliminated. In this regard, Mr. Grubb testified at trial that Mr. Carl called him into his office, handed him a termination notice and said "you can call this fired or whatever you please. You are done."

Mr. Grubb obtained a similar position with the Jackson County Medical Care Facility in April 1979, two months after commencing the present action. He voluntarily resigned approximately three months later to accept early retirement under Social Security.

b. The Finding of Race Discrimination

In ruling for Mr. Grubb on his claim of race discrimination, the district court found that the manner in which Mr. Carl advised Mr. Grubb that his position had been eliminated "at the least suggests an animus toward Mr. Grubb." 533 F. Supp. at 674, App. A-4. The court went on to find that:

> Other credited evidence establishes that the basis for the animus was Mr. Grubb's race and/or age. Mr. Grubb's testimony establishes that Mr. Carl directed him to fire three employees in the laundry that Mr. Carl believed were union activists and that, when Mr. Grubb took no action with regard to his direction, Mr. Carl asked him when he "was going to fire them niggers."
>
> It is also undisputed that Mr. Carl directed Ms. Fountain to report to him rather than to Mr. Grubb. I credit Mr. Grubb's testimony that Mr. Carl's expressed reason for this alteration in line of authority was explained to plaintiff in the following words: "A black man has no place supervising white women." *Id.*

The court also stressed what it characterized as the subjective "criteria" applied by Mr. Carl in determining which position would be eliminated and emphasized the fact that Mr. Carl did not apply those criteria to Mr. Grubb.

c. Award of Back Pay and Post-Judgment Remedies

Based upon Mr. Grubb's testimony concerning his acceptance and voluntary termination of subsequent employment with the Jackson County Medical Care Facility, the district court held that "the state of the record does not support a conclusion that the back pay attributable to post-termination causally flowed from the wrongful termination." 533 F Supp. at 677, App. A-11. The court went on to invite the submission of additional briefs, limited to the issue of whether Mr. Grubb was unavailable as a matter of fact and law for reinstatement during the period of time in which he elected to receive early Social Security payments, failing which the court would "conclude that the period of back pay terminated with plaintiff's cessation of employment in favor of retirement benefits." *Id.*

Subsequent to the submission of post-trial briefs, the court found that "where, as here plaintiff's own proof showed that he secured and then terminated his subsequent position in order to receive Social Security benefits, the record supports a conclusion that plaintiff failed to mitigate." App. B-1, 2. The court held, however, that it was "unable to conclude as a matter of law or fact that the election of early retirement was per se an act which rendered plaintiff unavailable for employment and thereby terminated back pay liability . . ." or that "early retirement was a voluntary career decision to remove himself from the work force . . ." In so ruling, the court noted the plaintiff's argument to the effect that the Social Security Act contemplates that a beneficiary may return to work and that a contrary ruling might be inconsistent with the provisions of the ADEA. App. B-2.

d. Reversal by the Court of Appeals

On appeal, the United States Court of Appeals for the Sixth Circuit reversed the finding of race discrimination, while affirming the dismissal of Mr. Grubb's age discrimination and implied contract claims. Senior Circuit Judge Weick delivered the opinion of the court, in which Judge Wellford concurred and to which Judge Engel dissented.[1]

The majority found that "it appears from the record that Willard Carl did bear considerable animus toward Grubb" but concluded that "[i]n view of the weakness of Grubb's evidence of discriminatory motivation for his discharge, and the strength of Hospital's explanation for its decision, we must — when faced with the district court's finding on this issue — 'be left with the definite and firm conviction that a mistake has been committed.'" 741 F.2d at 1497, App. E-20.

In particular, Judges Weick and Wellford found that the district court's decision to credit Mr. Grubb's testimony concerning one of the two alleged racial slurs was founded upon a clearly erroneous factual finding that was not only unsupported, but entirely contradicted, by the trial record.

> In addition, it appears that the District Court based its decision, to credit Grubb's testimony that Carl directed

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[1] The page limitation of this petition precludes a full discussion of the majority's exhaustive exposition of the trial record, as it relates to the district court's findings. The petitioner has, therefore, focused upon the most significant portions of that opinion and the most significant errors upon which the district court based its finding of discrimination.

The Court of Appeals' initial decision will hereinafter be referred to as *"Grubb I"* and the court's subsequent opinion, in which the court vacated its decision in *Grubb I,* will hereinafter be referred to as *Grubb II.*

> Mrs. Fountain to report to him because "[a] black man has no place supervising white women," on an erroneous finding. The District Court found that it was "undisputed" that Carl directed Fountain to report to him, but Fountain clearly testified that she continued reporting while they were still at West . . . Grubb himself also testified that Fountain continued reporting to him until they were "completely moved" at which time Grubb's position was terminated.

741 F.2d at 1497, App. E-21, 22.

Additionally, as the majority noted previously in the opinion, Mr. Carl denied at trial ever having made the two racist remarks attributed to him by Mr. Grubb. 741 F.2d at 1490, App. E-6.

Moreover, the majority found that even if it had to credit the district court's finding concerning the other racial slur, Mr. Grubb's own testimony indicated that such a remark was made more out of anti-union animus than racially motivated animus and that Mr. Carl's use of such language would have been "out of character based on all the other proof in the case." 741 F.2d at 1497, App. E-21.

In this regard, the majority noted that both Mrs. Fountain and Ms. Lurlene Osborne, with whom Mr. Grubb acknowledged being on friendly terms, could recall no incidence of discrimination by Mr. Carl. Additionally, Ms. Osborne, one of the three individuals that Mr. Carl allegedly wanted to fire and allegedly referred to as "niggers", testified that she and Mr. Carl were friendly and would occasionally visit each other's homes. 741 F.2d at 1494, App. E-15.

The court did not address the propriety of the district court's award of back pay and post-judgment remedies since the issue became moot upon reversal of the race discrimination

claim. In its factual discussion, however, the majority mentioned that Mr. Grubb had terminated his subsequent employment "due to low pay and disagreement with his superiors' labor policies . . ." 741 F.2d at 1491, App. E-8. It is unknown how the majority came to this conclusion. There is absolutely no evidence in the trial record that might somehow support such a finding and the district court made no such finding.

e. Affirmance of Race Discrimination Finding Upon "Rehearing" Before The Same Panel Of Judges

Acting upon the plaintiff's petition for a rehearing, Judge Wellford changed his position and voted to vacate the original judgment of the Court of Appeals and to affirm the judgment of the district court with respect to the race discrimination claim. In his concurrence to the opinion delivered by Judge Engel, Judge Wellford did not explain the basis for his change of heart. Rather, in his one paragraph concurrence, he simply stated that despite serious misgivings about the facts of this case he did not have "the *conviction* after examining the record carefully that error has been committed . . ." 759 F.2d at 547, App. H-2. Additionally, in writing for the majority, Judge Engel held without explanation that "a majority of the court also concludes that the trial judge did not err in fashioning appropriate relief." *Id.*

Foote Memorial then filed a timely petition for rehearing, in which it stressed that the new majority's action was inconsistent with this Court's recent holding in *Anderson* v. *City of Bessemer City*, particularly in light of the original majority's objective ascertainment of clear error in the district court's finding that Mr. Carl directed Mrs. Fountain to report directly to him and the district court's ultimate decision, based on that error of fact, to credit Mr. Grubb's testimony concerning one of the two alleged racial slurs upon which the court premised

its finding of racial animus. The petition also emphasized the original majority's misstatement concerning the facts underlying Mr. Grubb's decision to terminate his subsequent employment with the Jackson County Medical Care Facility.

Without addressing those issues, the court denied the petition on June 7, 1985, while noting that Judge Weick would have granted a rehearing en banc. App. I-1.

REASONS FOR GRANTING THE PETITION

Certiorari Should Be Granted To Further Clarify Both The Proper And Necessary Scope Of Appellate Review Under The Clearly Erroneous Standard.

a. Introduction

In *Anderson* v. *City of Bessemer City*, ____ U.S. ____, 105 S. Ct. 1504, 84 L.Ed.2d 518 (1985), this Court held that the Court of Appeals for the Fourth Circuit had misapprehended and misapplied the clearly erroneous standard in reversing the trial court's finding of sex discrimination. While concurring in the majority opinion, Justice Powell wrote separately of his concern that:

> [O]ne may read the Court's opinion as implying criticism of the Court of Appeals for the very fact that it engaged in a comprehensive review of the entire record of this case. Such a reading may encourage overburdened Courts of Appeals simply to apply Rule 52(a) in a conclusory fashion . . .

105 S. Ct. at 1515.

The Court of Appeals' abrupt and unexplained reversal of its prior decision in this action, less than four days after the issuance of this Court's opinion in *Anderson*,[2] illustrates the soundness of Justice Powell's apprehensions.

Judge Wellford's decision in *Grubb II* to affirm the trial court's finding of discrimination is entirely incompatible with his acknowledgment in *Grubb I* that the trial court's finding of discriminatory animus was founded upon an undisputably erroneous factual finding. Such a decision cannot be allowed to stand.

This Court's review and reversal of the decision in *Grubb II* is certainly necessary for the purpose of correcting the Court of Appeals' commission of clear legal error. At the same time, all courts of appeal must be reminded that, while being governed by strict standards of appellate review, they are not only empowered but, indeed, obligated to reverse a trial judge's factual findings as clearly erroneous when the trial record fails to support those findings and, most certainly, when the record unequivocally contradicts those conclusions.

In essence, the petitioner seeks this Court's determination as to which of the two published opinions by the same panel of the Court of Appeals represents the correct application of the clearly erroneous standard under the holding of *Anderson* v. *City of Bessemer City*.

The ultimate question that must be answered in this appeal is, of course, whether the district court's finding of race discrimination was clearly erroneous. *Anderson*, 105 S. Ct. at

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[2] The majority in *Grubb II* initially vacated its judgment in *Grubb I* by order, dated March 22, 1985. That order was itself vacated on April 5, 1985, since the accompanying written opinion had not yet been prepared. An order vacating the judgment in *Grubb I* was subsequently reissued on April 16, 1985. See App. F, G and H.

1513. A resolution of that issue will not, however, necessitate a comprehensive review of the trial record. The completeness of the statement of evidence set forth by the majority in *Grubb I* has been acknowledged without reservation by the majority in *Grubb II*.

As has been noted above, this petition contains but a brief summary of the majority's thorough evidentiary review in *Grubb I*. Yet, one cannot truly appreciate the soundness of the circumspect analysis in *Grubb I* and the corresponding impropriety of the essentially unreasoned decision in *Grubb II* without reviewing both opinions in their entirety.

a. Grubb I — The objective finding of clear and undisputable error

The undeniably erroneous factual premise upon which the trial court credited Mr. Grubb's testimony concerning Mr. Carl's alleged use of racial slurs on two occasions left the majority in *Grubb I* with no viable alternative other than to reverse the finding of race discrimination as being clearly erroneous.

In *Anderson* v. *City of Bessemer City*, *supra*, this court held that a Court of Appeals may not reverse a finding of discrimination "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety . . ." 105 S. Ct. at 1512. Unlike the Fourth Circuit, whose evidentiary analysis was reversed in *Anderson*, the majority in *Grubb I* was not confronted with and, therefore, did not choose between one of "two permissible views of the evidence." Rather, the court reversed the finding of race discrimination upon arriving at the *only* permissible view of the evidence.

The clearly erroneous nature of the district court's "undisputed" finding that Willard Carl directed Rosella Fountain to report directly to him and the inescapable consequences of

the error is beyond question. The trial record is completely devoid of any evidence, either disputed or undisputed, to the effect that Mr. Carl ever directed Mrs. Fountain to report directly to him. On the other hand, as the majority in *Grubb I* found, the uncontroverted testimony of both Mrs. Fountain and Mr. Grubb is completely irreconcilable with the factual finding, since both "clearly testified" that Mrs. Fountain continued reporting to Mr. Grubb until his position was terminated. 741 F.2d at 1497, App. E-21, 22. Moreover, Mr. Carl adamantly denied at trial ever having issued such a directive. Although not specifically cited by the majority in *Grubb I*, Mr. Carl's full testimony in this respect was as follows:

> Q. Mr. Carl, was there ever a time when you went to Mr. Grubb and asked him to terminate Lurlene Osborne, Maria Morales, and Joyce Wilson?
>
> A. No.
>
> Q. Have you ever used the word for an employee of the hospital calling them a "nigger"?
>
> A. No, sir.
>
> Q. Did you ever tell Mr. Grubb that Rosella Fountain would report to you because she was not to report to a black man?
>
> A. No, sir.

Joint Appendix, Vol. I, p.367-68.

The district court's error was two-fold. First, the court's statement that Mr. Carl issued the directive necessarily implied that there existed some evidentiary basis for the finding, although there exists absolutely none. Secondly, the court's finding that the fact was "undisputed" is undeniably contradicted by the trial record.

The implications of this material error to the remaining findings of the trial court cannot be overemphasized. In addition

to serving as one of the principal subsidiary facts underlying the trial court's ultimate finding of race discrimination, the "undisputed fact" of Mr. Carl's directive to Mrs. Fountain formed the very basis of the court's decision to credit Mr. Grubb's testimony that Mr. Carl told him that "a black man has no place supervising white women."

Mr. Grubb's credited testimony, in turn, played a decisive role in the trial court's ultimate finding of discrimination. Upon finding that Mr. Carl bore some animus toward Mr. Grubb, the court flatly concluded that Mr. Grubb's credited testimony concerning the two alleged slurs "establishes that the basis for this animus was Mr. Grubb's race and/or age." 533 F. Supp. at 674, App. A-4.

Briefly stated, the district court decided to credit Mr. Grubb's testimony, and thereby discredit Mr. Carl's contradictory testimony, due solely to its mistaken belief that there existed some corroborative evidence to the effect that Willard Carl had actually directed Mrs. Fountain to report directly to him rather than to Mr. Grubb and that such evidence had gone entirely undisputed. Under these circumstances, the district court's finding that Mr. Carl made the racial slur attributed to him by Mr. Grubb is just as clearly erroneous as the fact upon which the court based its decision to credit Mr. Grubb's testimony on that issue.

One can reasonably surmise that these clearly erroneous findings also tainted the trial court's perception and treatment of other evidence introduced at trial. It is quite likely that the trial court was substantially more inclined to credit Mr. Grubb's testimony concerning the other alleged slur and to accord that testimony much greater weight, upon the groundless assumption that his testimony concerning the remark at issue was supported by undisputed extrinsic evidence. Similarly, in light of the same mistaken belief concerning the alleged slur, it is doubtful that the court gave any

serious consideration to the undisputed and highly credible testimony of Rosella Fountain, Lurlene Osborne and others with respect to Mr. Carl's unbiased reputation and close personal relationship with minority employees of the laundry.

The prejudicial impact of those clearly erroneous findings, alone, compelled a reversal of the district court's finding of race discrimination. The majority's reversal of the judgment in *Grubb I* was proper and remains necessary and proper under the holding of *Anderson* v. *City of Bessemer City*.

Yet, in addition to the errors discussed above, the majority in *Grubb I* was also confronted with the district court's decision to credit Mr. Grubb's testimony concerning the other alleged slur despite the fact that Mr. Carl's use of such language would have been "out of character based on all the other proof in the case." 741 F.2d. at 1497, App. E-21. In addition to the testimony of Rosella Fountain and Lurlene Osborne, both of whom vouched for Mr. Carl's unbiased management of the laundry, as well as his close personal relationship with minority employees, the majority in *Grubb I* found that

> Although Grubb testified that Carl had exhibited racial bias on at least two occasions, there is no other evidence in the record of racial bigotry on his part, or that of any other Hospital official. An evaluation of Grubb's work made by Mr. Carl in early 1977 . . . does not evidence any propensity by Carl to act according to his alleged racial bias, even though the subjective nature of such an evaluation would give him an opportunity to do so. A comparison of that evaluation with those made by Harold Petke when he was Grubb's immediate superior at Mercy Hospital . . . fails to show any significant change in how Grubb's job performance was viewed. Judge Boyle specifically found no evidence of discriminatory motives in either Petke or Culhane, the two other administrators most directly involved in Grubb's termination.

741 F.2d at 1494, App. E-14, 15.

As this Court explained in *Anderson*, the special deference that must be paid to a trial court's credibility findings is not absolute and does not insulate them from appellate review. An appellate court retains the obligation to diligently examine the evidence at issue to ensure that the district court's decision is based upon plausible and internally consistent factual findings:

> Documents or objective evidence may contradict the witnesses' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable fact finder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

105 S. Ct. at 1512-13.

Extrinsic, objective evidence before the district court in this action rendered its opinion internally inconsistent and implausible. In the final analysis, the majority in *Grubb I* correctly found that "although Grubb's testimony, when viewed in isolation, could be substantial evidence for the District Court's finding of racial animus, that finding must be reviewed in light of the entire record, and reversed when it is against the clear weight of the evidence." 741 F.2d. at 1494, App. E-16.

b. The majority opinion in Grubb II

In writing for the majority in *Grubb II*, Judge Engel held simply that the issues with respect to Mr. Grubb's claim of racial discrimination were primarily factual and "[i]n view of the completeness of the statement of facts, which is already published, a majority of the court believes that they are sufficient to support . . ." the finding of racial discrimination. 759 F.2d at 547, App. H-2.

Judge Wellford, who fully concurred in the majority opinion of *Grubb I*, reemphasized his serious misgivings about the facts in this case. While also stating that he probably would have

reached a different result with respect to the findings and conclusions made by the trial judge, he briefly concluded that "it is she who had the responsibility to make the credibility determinations after an opportunity to assess the proof and evidence." Accordingly, Judge Wellford held that he no longer had the "conviction" that error had been committed. *Id.*

A fair reading of Judge Wellford's concurrence in *Grubb II* indicates that, while still in agreement with the *Grubb I* examination and discussion of the trial record, he now believes that his perception of the evidence must in all events give way to the conclusions of the trial court, whether or not supported by substantial evidence. Judge Engel's dissent in *Grubb I* indicates a similar inclination toward unqualified deference to the district court. In his dissent, Judge Engel noted that the motives behind the termination of Mr. Grubb "were probably mixed, and it is possible to draw a number of differing and even conflicting inferences from the proof" but that it was the trial judge "to whom the law has assigned the task of unscrambling the facts and ascertaining the truth." 741 F.2d at 1502, App. E-32.

The scant majority and concurring opinions in *Grubb II* offer no explanation as to why the errors observed by the majority in *Grubb I* should not compel a reversal of the trial court's findings. It is of the utmost significance that the majority in *Grubb II* has challenged not one of the observations made by the majority in *Grubb I* but, rather, has held inferentially that the errors disclosed in *Grubb I* are just not enough.

Grubb II represents a standard of review that improperly goes one step further than the already stringent standards set forth in *Anderson* v. *City of Bessemer City* and literally transforms the concept of deference into one of absolute relinquishment of an appellate court's authority to challenge the findings of a district court, whatever the circumstances. Where, however, an appellate court's ascertainment of material error is

founded upon an objective examination of the entire trial record, rather than a subjective interpretation of undisputed evidence, there can exist no rational basis for deferring to the trial court's factual findings. The holding in *Grubb I* is the only appropriate response to the facts of this case and should have been left undisturbed.

II.

Certiorari Should Also Be Granted To Reverse The District Court's Award Of Back Pay And Post-judgment Remedies For The Period Subsequent To Mr. Grubb's Voluntary Termination Of Comparable Subsequent Employment, Since The Award Of Such Relief Conflicts With This Court's Holding In *Ford Motor Co.* v. *EEOC.*

Although the district court found that Mr. Grubb had voluntarily terminated his employment with the Jackson County Medical Care Facility and had elected "early retirement", the court illogically found that it had neither a factual nor legal basis to conclude that Mr. Grubb's conduct constituted a voluntary career decision to remove himself from the work force. In so holding, the court adopted the plaintiff's argument that the Social Security Act contemplates a beneficiary's right to continue to work and that any contrary ruling might be inconsistent with the provisions of the ADEA.

The district court's rationale might be sound, when read outside of the context of the present factual situation. This case, however, does not simply involve a plaintiff who elected to collect Social Security benefits during a period of forced unemployment. Rather, all of the evidence at trial pointed to the simple fact that Mr. Grubb voluntarily terminated his subsequent employment for the sole purpose of collecting Social Security and since that point in time has not sought

employment in any form, other than to move for a forced reinstatement with Foote Memorial.

The intent of Mr. Grubb to remain unemployed is beyond dispute and, therefore, the district court's finding that a person's election to receive Social Security benefits cannot create a presumption of voluntary withdrawal from the work force is erroneous and completely inapplicable to the present facts. The award of back pay and post-judgment remedies for the period subsequent to Mr. Grubb's early retirement is completely at odds with the holding in *Ford Motor Co.* v. *EEOC,* 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed. 2d 721 (1982), where this Court emphatically stated that such conduct results in a plaintiff's forfeiture of back pay entitlement.

> Although the un- or underemployed claimant need not go into another line of work, accept a demotion or take a demeaning position, he forfeits his right to back pay if he refuses a job substantially equivalent to the one he was denied.

458 U.S. at 231-232.

The majority in *Grubb II* affirmed the award of back pay and post-judgment remedies without comment. One can only assume, therefore, that the court did so upon its mistaken impression of the evidence concerning the circumstances surrounding Mr. Grubb's retirement. In this regard, the majority in *Grubb I* noted as part of its factual discussion that the plaintiff's voluntary resignation was "due to low pay and disagreement with his superior's labor policies." 741 F.2d at 1491, App. E-8. There exists, however, absolutely no evidence in the trial record to support that statement of fact. Nor did the district court recite any such fact in support of its award. The following testimony of the plaintiff was the only evidence introduced at trial concerning his resignation from comparable employment as a laundry manager.

> Q: Do you remember the question? I am asking why you left that employment?
>
> A. Oh, I was on Social Security at that time. I went on Social Security when reported how much money I was making, they told me if I continued to work there they would take all my Social Security and leave me with $40. I wasn't willing to sacrifice that. I wasn't making enough money for the requirements of the job and just went up and resigned.

Joint Appendix at 322.

The plaintiff did not testify that the job was low paying. Rather, he testified that he was not satisfied with his salary vis-a-vis the requirements of his position and that he was not willing to sacrifice the Social Security benefits that he would have received in the absence of full-time employment. There was no testimony at all concerning any disagreement with his superiors' labor policies.

Another basis for the district court's refusal to find a voluntary withdrawal from the job market was the fact of Mr. Grubb's willingness to be reinstated at Foote Memorial. If for no other reason, certiorari should be granted in this matter for the purpose of dispelling the notion that a Title VII plaintiff may accept and then terminate comparable subsequent employment in contemplation of a favorable resolution of his claim. A plaintiff must not be permitted to voluntarily withdraw from the job market, while taking a calculated risk that the defendant will eventually be required to reinstate him and reimburse him for the amounts he would have earned during that interim period.

Title VII, as construed by this Court in *Ford Motor Co.* v. *EEOC,* does not permit a plaintiff to act so complacently.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

DYKEMA, GOSSETT, SPENCER,
GOODNOW & TRIGG

By:_____

John H. Schomer (P20051)
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(517) 787-2550

Dated: September 3, 1985

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* Petitioner does not have any parent company, subsidiaries or affiliates.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES H. GRUBB,
Plaintiff,

-vs-

Civil Action No. 79-70434
Honorable Patricia J. Boyle

W. A. Foote Memorial Hospital Inc.,
a Michigan corporation,
Defendant.

OPINION AND ORDER GRANTING JUDGMENT IN FAVOR OF PLAINTIFF

Plaintiff, Charles H. Grubb, brought an action alleging that he was terminated from his position at W. A. Foote Memorial Hospital, Inc., due in whole or part to his race and/or his age. Plaintiff based his action on Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, the Civil Rights Act of 1870, 42 U.S.C. § 1981, the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621, and the Michigan Civil Rights Act, Mich. Comp. Laws Ann. § 37.2101 *et seq.** Plaintiff seeks reinstatement, back pay (including fringe benefits) and interest, damages for emotional

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* At the time of trial, Plaintiff was permitted, over Defendant's objections, to amend the complaint, to add a theory of breach of contract based the authority of *Toussaint v. Blue Cross & Blue Shield of Michigan,* 408 Mich. 579 (1980), in which the Michigan Supreme Court recognized a cause of action for wrongful discharge of an employee at will based upon a record that would permit the fact finder to infer that there was a company policy and therefore a contract not to discharge except for just cause and "only in accordance with" established personnel practices and procedures. *Id.* 620. While the language of the majority opinion may be sufficiently expansive to cover unwritten practices and procedures applicable to a layoff and/or reduction situation, absent further guidance from the state courts, I decline to extend *Toussaint* to the present factual situation involving a position elimination rather than a discharge case.

distress, punitive damages, liquidated damages pursuant to 29 U.S.C. § 626(b) of the ADEA, and attorney fees.

A bench trial having been held, the following will constitute findings of fact and conclusions of law. Fed. R. Civ. P. 52(a).

Plaintiff is a sixty-four-year-old black man who, prior to his separation from employment in 1977, was for eighteen years Laundry Manager for the Sisters of Mercy Hospital in Jackson, Michigan. There is no dispute that during those years Mr. Grubb was an exemplary employee nor that he is qualified for the position of supervisor of the laundry. In 1975 Foote Memorial Hospital purchased Mercy Hospital, the latter being renamed W. A. Foote Memorial Hopsital, West (Foote West). This acquisition and a subsequent administrative direction to undertake cost containment policies is the factual backdrop of the instant situation.

At the time of consolidation, Ms. Rosella Fountain was employed by the Sisters of Mercy in the laundry as a supervisor. Ms. Fountain's duties as a supervisor included line supervision such as sorting, packaging, and scheduling. Ms. Fountain was supervised by Mr. Grubb, had been employed at Mercy for forty years, and was likewise a highly qualified employee. Mr. Willard Carl was the Director of Laundry Services at the acquiring hospital (Foote Memorial East).

Following administrative consolidation, the Laundry Committee, which had been charged with responsibility for suggestions regarding laundry consolidation, recommended the centralization and physical consolidation of laundry services at Foote East with delivery of linens to Foote West (Exhibit 10). The memo recommended, in pertinent part, the following consolidated personnel table: one manager, one assistant manager, one crew leader, and elimination of the supervisor position. Thus, in 1975, the projected personnel table contemplated two managerial positions and the elimination of the supervisor position (Ms. Fountain's position).

Pursuant to these recommendations, Mr. Grubb was designated Assistant Department Head of the Laundry as of April 1, 1976, and Mr. Carl became Department Head of the consolidated laundry (Exhibit 36). The supervisor's position was not eliminated.

In late 1976 or early 1977, Mr. Carl proposed a laundry budget for 1978-1979 to the Defendant's central budgetmaking authority, suggesting the elimination of the assistant department head position (Mr. Grubb's position), and the retention of the supervisor position.

Mr. Harold Pelke, the Associate Hospital Administrator responsible for the laundry department, testified that he asked Mr. Carl two or three times regarding elimination of the position and affirmed that Mr. Carl told him there was not a place for Mr. Grubb. Mr. Pelke testified that he did not know whether the hospital had a policy regarding reduction of work force. Mr. Carl also testified he was unaware of whether the hospital had a reduction policy. Mr. Gerald Culhane, Corporate Director of Personnel, testified that Corporate Policy 355 was a codification of an unwritten policy applicable to Mr. Grubb. This procedure requires notification to layed off and qualified workers of vacant positions within the department and the hospital. Despite the fact that Mr. Carl resigned his position in September of 1979 and did not return until March or April of 1980, it is undisputed that the only position offered to Plaintiff was that of a truck driver.

It is also undisputed that there were no written criteria applicable to the question of which position should be eliminated. The testimony establishes that this decision ultimately rested with Mr. Carl. Mr. Carl testified at trial that he selected Ms. Fountain's position for continuation, using, among other criteria, her experience in scheduling, ability to supervise production, supervision, and ability to "work with the women" (a reference to staff personnel with the laundry).

Mr. Carl also testified that he did not know whether Mr. Grubb could perform scheduling nor of his abilities in on-line supervision. Fairly characterized, Mr. Carl's testimony can be understood as asserting that he did not apply the criteria to Plaintiff nor did he make an attempt to determine whether Mr. Grubb possessed the skills he deemed necessary for operation of the laundry.

Further, the testimony establishes that Mr. Carl advised Mr. Pelke by February of 1977 that the assistant department head position was eliminated, that Mr. Carl advised Mr. Culhane by spring of 1977 that "there wasn't a place" for Mr. Grubb, and that Mr. Carl advised Ms. Fountain before April of 1977 that he had decided to retain her rather than Plaintiff. However, it was not until July 10, 1977, that Mr. Carl advised Plaintiff that his position had been eliminated by telling him, according to the credited testimony of Plaintiff, "You can call this fired, kicked out or whatever you want, but you're through." This evidence, which was not rebutted, at the least suggests an animus toward Mr. Grubb.

Other credited evidence establishes that the basis for this animus was Mr. Grubb's race and/or age. Mr. Grubb's testimony establishes that Mr. Carl directed him to fire three employees in the laundry that Mr. Carl believed were union activists and that, when Mr. Grubb took no action with regard to this direction, Mr. Carl asked him when he "was going to fire them niggers."

It is also undisputed that Mr. Carl directed Ms. Fountain to report to him rather than to Mr. Grubb. I credit Mr. Grubb's testimony that Mr. Carl's expresed reason for this alteration in line of authority was explained to Plaintiff in the following words: "A black man has no place supervising white women."

Finally, I specifically credit Mr. Grubb's testimony that Mr. Carl told him he was "too old and set in his ways" and that he ought to retire.

I do not find, however, that the actions of either Mr. Culhane or Mr. Pelke in acquiescing in Mr. Carl's determination were prompted by discriminatory motives. The deposition evidence of William Jewell, a former employee of Defendant, to the effect that Mr. Culhane made racially discriminatory remarks, was not persuasive.

These findings of fact support the conclusion that Defendant Foote permitted discriminatory employment practices. Procedures which rested almost entirely on subjective evaluation and favorable recommendations of an immediate supervisor not only had a discriminatory impact on a minority employee but permitted the situation, which the Court finds obtained here, intentional discrimination on the part of an individual employee. *See Long* v. *Ford Motor Co.,* 496 F.2d 500, 506 (6th Cir. 1974); *Rowe* v. *General Motors Corp.,* 457 F.2d 348 (5th Cir. 1972).

Defendant contends that Plaintiff has failed to sustain the burden of proof and that Defendant had a valid economic reason for elimination of the position. *See Mt. Healthy City School District* v. *Doyle,* 429 U.S. 274 (1977); *King* v. *Laborers Local 818,* 443 F.2d 273 (6th Cir. 1971).

The parties appear to agree that the applicable burdens and order of proof impose upon the employer the burden of coming forward with evidence of a legitimate non-discriminatory reason for its action which, if sufficient to raise a genuine issue of fact as to its discriminatory purpose, dispels the inference of discrimination arising from Plaintiff's establishment of a prima facie case under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. ____, 49 U.S.L.W. 4214 (March 4, 1981).

> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been

> the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.

Id. at ____, 49 U.S.L.W. at 4216 (citation omitted).

Assuming arguendo that the Plaintiff must prove that race or age was a determining factor in the employer's decision in the sense that "but for" the employer's motive to discriminate the action would not have been taken, *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979), Plaintiff has succeeded in persuading the Court that Mr. Carl's selection of Mr. Grubb for termination was made for unlawful reasons. Necessarily, if the fact finder is persuaded that race and/or age was a determining factor in the decision, it cannot be concluded that "the employer also had a lawful non-discriminatory motivation for his actions which when considered *by itself* would have caused the same result as his discriminatory purpose." *King* v. *Laborers Local 818, surpa,* 443 F.2d at 279 (emphasis added). Stated otherwise, while Defendant may have had a valid economic reason for the elimination of a supervisory position in the laundry, it does not follow that the decision to terminate Mr. Grubb would have been reached despite Mr. Carl's unlawful animus.

Accordingly, I conclude that judgment must enter in favor of Plaintiff on the claim that the discharge was in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) *et seq.*, the Civil Rights Act of 1870, 42 U.S.C. § 1981, and the Michigan Civil Rights Act, Mich. Comp. Laws Ann. § 37.2101 *et seq.* The single remark regarding age, however, does not persuade me that age was a causal factor in the action taken, particularly when considered with the fact that Ms. Fountain was approximately 63 years old at the time Mr. Carl selected

her position for retention. I therefore find in favor of Defendant on the age claim and on the breach of contract claim, and judgment for Defendant will be entered accordingly.

As to those claims in which liability has been determined, Plaintiff seeks damages for emotional distress, compensable under the Michigan Civil Rights Act, *see Freeman* v. *Kelvinator, Inc.*, 469 F. Supp. 999 (E.D. Mich. 1979), and punitive damages, under Title VII and Section 1981, *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459-60 (1975), in a total amount of Five Hundred Thousand Dollars ($500,000). Plaintiff also seeks back pay and the value of fringe benefits to July, 1981, interest thereon, "front pay" to retirement age should reinstatement not be ordered, and reasonable attorney fees and costs.

Defendant has acknowledged that *Johnson* v. *Railway Express Agency* allows an award of both equitable and legal remedies. Such damages are recoverable under 42 U.S.C. § 1981 when the claim is joined with a Title VII claim. *Jones* v. *Metropolitan Hospital,* 88 F.R.D. 341, 343 (E.D. Mich. 1980).

The Court awards to Plaintiff under the 1981 claim and the state claim damages for mental anguish and emotional distress. Mr. Grubb's testimony sketched a history of an orphaned child with a seventh-grade education who acquired a GED in the army and began his employment at Mercy Hospital sweeping floors and picking up dirty linen. By virtue of his diligence and a work ethic, which Mr. Grubb described as a belief that "I can do a little bit of everything you can do a lot of," he progressed steadily and in 1961 was appointed laundry manager. In 1966 he was certified by the American Laundry Institute. It is conceded by Defendant that Plaintiff was highly skilled in laundry management, and Mr. Grubb's professionalism and justifiable pride in his accomplishments was evident. The latter was poignantly underscored by Mr. Grubb's testimony describing his reaction to Exhibit 44, an article from a Jackson, Michigan, newspaper describing his accomplishments: "It was the first time anything had ever been said about anything I did."

The testimony painted a picture of a man of rectitude and dedication who had, through his own effort and determination, overcome the economic and educational limitations on his potential and had secured a position of dignity and status in life. Mr. Carl's belittling direction to Mr. Grubb "to fire those niggers," his statement that a black man has no place supervising white women, his lengthy failure to tell Mr. Grubb that his position was being eliminated during which Mr. Grubb was told by non-supervisory personnel from both hospitals that his position was being eliminated, Mr. Carl's elimination of Mr. Grubb's office at Foote East while Mr. Grubb was at Mercy overseeing the closing of the laundry operation, and his ultimate callousness in telling Mr. Grubb "he was through" caused Mr. Grubb great anxiety and humiliation. Loss of the position, which to Plaintiff represented the culmination of his life efforts, was devastating to Mr. Grubb. He felt useless after a lifetime: "You're not of

your worth anymore." The Court awards the Plaintiff Twenty-Five Thousand Dollars ($25,000) in compensatory damages for emotional distress.

A finding of intentional discrimination presumptively entitles Mr. Grubb to back pay and reinstatement. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405 (1975). Title VII remedies are equitable and are, in the first instance, committed to the discretionary judgment of the trial court.

Plaintiff has requested reinstatement and testified at trial that if offered the opportunity to return he would do so. While reinstatement has been found inappropriate where Plaintiff has occupied a high level or unique position and the employment relationship has been seriously impaired, it has been said that reinstatement, like back pay, should be denied "only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* 421.

Since tension and hostility commonly flow from the filing and litigation of such emotionally charged claims, a sweeping rejection of requests for reinstatement on this ground could frustrate the purpose of Title VII. While the consolidated hospital unit has only twenty-five employees and two managerial-level supervisors, it appears that Mr. Grubb has had a longstanding, close-working relationship with Rosella Fountain and that there is no manifested ill-feeling between he and other hospital executives, such as Mr. Pelke or Mr. Culhane. This litigation has not, in short, been marked by unusual hostility, *see EEOC* v. *Kallir, Phillips, Ross, Inc.,* 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd mem.,* 559 F.2d 1203 (2d Cir. 1977), *cert. denied,* 434 U.S. 920 (1977), and I am not convinced that Plaintiff's reinstatement would jeopardize Defendant's legitimate interests in the smooth operation of its laundry services.

THEREFORE, THIS COURT ORDERS that Plaintiff be reinstated to his position as Assistant Department Head in the Laundry Department or a comparable position in the event there is not such a position available, ENJOINS the Defendant from subjecting Plaintiff to any further discriminatory treatment, and AWARDS Mr. Grubb full back pay and benefits from July, 1977, to the date of termination of his employment with Jackson County, less Three Thousand Six Hundred Dollars ($3,600), the amount actually earned during his employment with the Jackson County Medical Society, plus interest to the date of judgment. This finding is subject to modification pending receipt and review of the additional submissions requested below. The Court also awards reasonable attorney fees and costs.

Defendant contends, with respect to the amount of back pay, that back pay should be mitigated by the amount Plaintiff could have earned by the exercise of reasonable diligence "had he not chosen to quit" his employment with the Jackson County Medical Facility (Defendant's Brief on Damages p. 6). Whether Mr. Grubb's actions were reasonable under the circumstances, that is whether he should have continued his employment and thereby mitigated his damages, is an issue as to which Defendant had the burden of proof. *See Kaplan* v. *IATSE,* 525 F.2d 1354, 1362-63 (9th Cir. 1975). Plaintiff cites *EEOC* v. *Ford Motor Co.,* 25 FEP 724 (4th Cir. 1981), for the proposition that Defendant's liability for back pay does not end when a discrimination victim obtains substantially equivalent employment. While I accept the principle that mere interim employment at substantially equivalent compensation does not as a matter of law terminate entitlement to back pay, this proposition does not meet Defendant's claim that amounts earnable by Plaintiff through continuation of his employment should be deducted from any back pay awards. Nor does it meet the more fundamental question, not raised by Defendant, as to whether during the period of time in

which Plaintiff elected to receive early social security payments he was unavailable as a matter of fact and law for reinstatement. The state of the record does not support a conclusion that the "back pay" attributable to post-termination causally flowed from the wrongful termination. *See* B. Schlei & P. Grossman, Employment Discrimintion Law 1240 (1976). *See also Hodgson* v. *Ideal Corrugated Box Co.*, 10 FEP 744, 752 (N.D. W. Va. 1974).

Since this issue has not been adequately briefed by either party, I will invite the submission of additional briefs limited to this issue. Briefs on the issue of whether amounts "earnable" with Jackson County should be deducted from the ultimate award and on the issue of whether Plaintiff was unavailable for reinstatement at the time of early retirement are to be filed *within fourteen (14) days* of the entry of this opinion, failing which the Court will conclude that the period of back pay terminated with Plaintiff's cessation of employment in favor of retirement benefits.

With respect to the claim for punitive damages, while the Court has authority under 42 U.S.C. § 1981 to award such damages in certain circumstances, *Johnson* v. *Railway Express Agency, supra,* I do not conclude that Defendant's managerial-level employees acted in willful and flagrant violation of the law. Plaintiff's examples of willfulness are, in my judgment, more accurately characterized as the omission of carefully drawn objective policies which would, in all likelihood, have ameliorated the potential for the discrimination which I have determined occurred. I do not conclude that the absence of such guidance constitutes oppressive conduct justifying assessment of punitive damages against Defendant hospital. *Cf. Gore* v. *Turner,* 563 F.2d 159, 164-65 (5th Cir. 1977) (punitive damages awarded due to "seriousness" of Defendant's conduct).

Plaintiff having prevailed in the case, the Court is obligated to award attorney fees at a rate consistent with those fees traditionally paid by a fee-paying client and for all time reasonably expended. *Northcross* v. *Board of Education,* 611 F.2d 624 (6th Cir. 1979), *cert. denied,* 447 U.S. 911 (1980). Plaintiff claims a total of Thirty-Five Thousand Two Hundred Sixty-Three Dollars ($35,263) in fees and a total of One Thousand Two Hundred Eighty-Nine Dollars ($1,289) in out-of-pocket costs. The fees are calculated in terms of hours of services as set forth below.

TABLE IV — FEES AND COSTS

1981	Rate Per Hour	Total Hours	Fee
Joseph C. Marshall, III	$ 80.00	152	$12,160.00
Robert P. Young, Jr.	$ 80.00	107	8,560.00
Thomas G. Kienbaum	$110.00	3	330.00
Henry W. Saad	$ 95.00	9	855.00
Marguerite Mahler	$ 35.00	47	1,645.00
Warren Hoeft	$ 35.00	15	525.00
Eric Luden (summer assoc.)	$ 35.00	39	1,050.00
File Basket Assoc.	$ 30.00	2	45.00
1981 Total			$25,170.00
1980			
Joseph C. Marshall, III	$ 70.00	53.6	$ 3,752.00
File Basket Assoc.	$ 30.00	1.9	57.00
1980 Total			$ 3,815.00
1979			
Joseph C. Marshall, III	$ 65.00	69	$ 4,485.00
File Basket Assoc.	$ 30.00	1.6	48.00
1979 Total			$ 4,533.00
1978			
Joseph C. Marshall, III	$ 60.00	7.6	$ 456.00
			456.00
Total Fees			33,974.00
Expenses, (see statement attached)			1,289.00
TOTAL:			$35,263.00

The hourly rate set forth appears reasonable with two exceptions: time and rate attributed to the File Basket Association, the nature and function of which is not described, and the total amount of hours claimed by Mr. Marshall and Mr. Young. While the chart does not distinguish between trial time and pretrial preparation, this Court's official records show that five (5) trial days were had for a total of twenty (20) hours. Both Mr. Young and Mr. Marshall were present throughout the trial, and each actively participated in it. While each commendably performed their respective responsibilities, the presence of two lawyers, where the trial is neither protracted nor complex, cannot be considered traditional in an analogous fee-paying instance. On the assumption, therefore, that the chart represents duplicative billing for trial hours, the total hours claimed will be reduced by twenty (20), at Eighty Dollars ($80) per hour, for a total reduction of One Thousand Six Hundred Dollars ($1,600).

Plaintiff has not requested any upward adjustment reflecting contingency or other unusual factors, and there is not a basis in the record for such an adjustment. Costs, as prayed, appear reasonable and necessary. The total compensation awarded as attorney fees is Thirty-Two Thousand Two Hundred Twenty-Four Dollars ($32,224), representing total fees claimed minus One Thousand Six Hundred Dollars ($1,600) for duplicative

attorney fees and minus amounts attributable to the File Basket Association. Claims for additional fees attributable to further briefing may be subsequently presented.

IT IS SO ORDERED.

Date: October 30, 1981
Detroit, Michigan

/s/ PATRICIA J. BOYLE

Patricia J. Boyle
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES GRUBB,
Plaintiff,

-vs-

Civil Action No. 79-70434
Honorable Patricia J. Boyle

W. A. FOOTE MEMORIAL HOSPITAL INC.,
a Michigan corporation,
Defendant.

MEMORANDUM OPINION AND ORDER ON DAMAGES

On October 30, 1981, this Court entered an opinion and order granting judgment in favor of Plaintiff, awarding damages for emotional distress and attorney's fees and costs and deferring a final determination of back pay pending further briefing.

The issues presently before the Court are (1) whether amounts earnable from Plaintiff's subsequent employment with Jackson County should be deducted from the ultimate award and (2) whether entitlement to back pay should cease as of the time Plaintiff ceased work at Jackson County Medical Facility and elected to receive social security benefits.

With respect to the first issue, I find that amounts earnable at Jackson County were "amounts earnable with reasonable diligence by the person or persons discriminated against." 42 U.S.C. § 2000e5(g). While the burden of proving a failure to mitigate rests on Defendant, I find that where, as here,

Plaintiff's own proofs show that he secured and then terminated his subsequent position in order to receive social security benefits, the record supports a conclusion that Plaintiff failed to mitigate. Therefore amounts which Plaintiff could have earned had he continued in that employment must be deducted from the ultimate award, *McDaniel v. Essex International Inc.*, 509 F. Supp. 1055 (W.D. Mich. 1981).

With regard to the second issue, I am unable to conclude as a matter of law or fact that the election of early retirement was per se an act which rendered Plaintiff unavailable for employment and thereby terminated back pay liability, see "Employment Discrimination Law," Schlei and Grossman at 1240. The Court has found as a fact that Mr. Grubb is willing and available to return and has before it neither a factual nor a legal basis to conclude that early retirement was a voluntary career decision to remove himself from the work force, which would have occurred had he not been discriminatorily discharged. *See DiSalvo v. Chamber of Commerce of Greater Kansas City,* 416 F. Supp. 844 (W.D. Mo. 1976). Plaintiff notes that the Social Security Act contemplates that a beneficiary may continue to work, 42 U.S.C. § 403, and that such a ruling might be inconsistent with the provisions of the ADEA which requires an employer to consider persons for employment who are less than seventy years old.

Finally, while the parties were not requested to brief this issue, Defendant has included in his supplementary brief an argument bearing on the propriety of the order for reinstatement of Plaintiff. Defendant notes that the reinstatement of Mr. Grubb would require the creation of a new managerial position, that the elimination of Plaintiff's prior managerial position occurred in the course of an across-the-board economic reorganization, and that reinstatement would impinge the position of an innocent party, Ms. Fountain.

While not solicited by the Court, I will treat Defendant's claim as a request for reconsideration of the order for reinstatement and permit Plaintiff to file a reply thereto within ten (10) days of the date of this order. This reply should include authority supporting the requested award of "front pay." Within five (5) days thereafter, Defendant may file a response as to the "front pay" issue only.

Plaintiff will be permitted to claim additional attorney fees and the Court will consider those together with those requested in Plaintiff's statement of January 4, 1982.

IT IS SO ORDERED.

Date: February 4, 1982
Detroit, Michigan

/s/ PATRICIA J. BOYLE

PATRICIA J. BOYLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CHARLES GRUBB,
Plaintiff,

-vs-

Civil Action No. 79-70434
Honorable Patricia J. Boyle

W. A. FOOTE MEMORIAL HOSPITAL, INC.,
a Michigan corporation,
Defendant.

MEMORANDUM OPINION AND ORDER ON DAMAGES ISSUES

Having reviewed the submissions requested by the Court, the Court now finds as follows on the remaining remedy issues.

"Front pay" is appropriate to the situation in which an employee, unlawfully denied a position, is unable to achieve his "rightful place" because of the absence at the time of judgment of an available position. *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir. 1976). While "front pay" has been ordered from the date of termination to the date of reinstatement as to an individually discharged employee, *Whatley v. Skaggs Companies, Inc.*, 502 F. Supp. 370, 377 (D.C. Cal. 1980), it is clear that the fashioning of equitable remedies is a matter committed to the court's sound discretion and that reinstatement has been more frequently found appropriate where there is a provable potential for an available position, as in a clerical or factory situation, which would not affect innocent incumbent workers. *Patterson, supra,* 535 F.2d at 268.

The remedial section of the National Labor Relations Act Section 10(c), 29 U.S.C. § 160(c), is the model for Section 706(g). While reinstatement and back pay are normal remedies as to employees covered by the Act, supervisors are not protected in their own right and "[c]ourts have used reinstatement of a discharged supervisor as a remedy sparingly and in only narrowly defined circumstances." *NLRB v. Southern Plasma Corp.*, 626 F.2d 1287, 1294 (5th Cir. 1980). Hence, cases decided under the Act are of little guidance. It has been recognized, however, both in the context of the National Labor Relations Act, *NLRB v. Apico Inns of California, Inc.*, 512 F.2d 1171 (9th Cir. 1975), and of Title VII, *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied* 434 U.S. 920 (1977), that reinstatement may properly be denied where the renewal of the relationship bids ill for all concerned.

Although I have found that the lawsuit was not characterized by bitterness, I conclude that an order of immediate reinstatement is inappropriate.

As the court stated in *Patterson, supra,* "A primary goal of Title VII is to induce voluntary compliance by employers and unions. Demoting employees, especially those who are not responsible for wrongdoing, undoubtedly would encounter more resistance than deferring their future expectancies." 535 F.2d at 268 (citations omitted).

While the statement was made in the context of a proposed remedy for unlawful failure to promote, I find that, in the circumstances of this case, where the evidence established both that a limited and diminishing number of managerial positions exists at Defendant's facility and that Mrs. Fountain, the incumbent employee, was also highly qualified for the position and played no part in Defendant's unlawful acts, reinstatement might itself engender hostility not conducive to the

promotion of voluntary compliance. As in *Patterson,* the more appropriate remedy is an order for "front pay."

Plaintiff will be awarded front pay until he is able to obtain his rightful place with Defendant. The Court will retain continuing jurisdiction, and Plaintiff may petition annually for a back pay award calculated at the level of assistant manager. I deem this method of award appropriate in view of the fact that Plaintiff has opted for early retirement, and the Court has no way of knowing whether he will elect to continue in this status or accept a position if and when one is proferred and in view of the further fact that the limited size of Defendant's operation and Plaintiff's highly specialized position within it may effectively foreclose restoration of his rightful place.

At the time of this petition, Defendant may present evidence of amounts earnable with reasonable diligence from the Jackson County facility and any other evidence on failure to mitigate. Plaintiff has presented no authority for the claim that the award of front pay should not be so limited and a contrary conclusion would be inconsistent with the purpose of the award, that is to restore Plaintiff to the position he would have been in were it not for the unlawful discrimination. But for his cessation of employment, Plaintiff would have been receiving wages from the Jackson facility. Accordingly these amounts are deductible from the yearly award.

The parties are directed to confer promptly upon receipt of this order and to present within twenty (20) days of the date of this order a proposed form of judgment incorporating the findings of this Court's order of October 30, 1981, February 5, 1982, and the instant order, including attorney fees awardable to Plaintiff's counsel. The proposal shall include fringe benefits which would have been received from the date of the

discriminatory act to the date of this order. In the event the parties are unable to agree, the parties may independently make submissions. Upon receipt of the parties' position, the Court will enter an appropriate judgment.

IT IS SO ORDERED.

Date: April 29, 1982
Detroit, Michigan

/s/ PATRICIA J. BOYLE

PATRICIA J. BOYLE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Charles H. Grubb,
Plaintiff,

-vs-

Civil Action
Docket No. 79-70434
Honorable Patricia J. Boyle

W. A. Foote Memorial Hospital, Inc.,
a Michigan corporation,
Defendant.

JUDGMENT ON DECISION BY THE COURT

This action came on for trial before the court, United States District Judge Patricia J. Boyle presiding. The issues having been duly tried and a decision having been duly rendered,

I.

MONETARY AWARD

It is ordered and adjudged that the Defendant shall, upon entry of this judgment, pay to the Plaintiff the following items of damages:

Plaintiff has suffered an actual loss of wages from the date of his termination to the date of entry of this judgment of Ninety-Nine Thousand Five Hundred Sixty-Nine and 60/100 Dollars ($99,569.60). This figure shall be reduced by Forty-One Thousand Eight Hundred Eighty and 00/100 Dollars ($41,880.00). Defendant is hereby ordered to imediately pay

to Plaintiff a net amount of Fifty-Seven Thousand Six Hundred Eighty-Nine and 60/100 Dollars ($57,689.60), which amount represents the difference between the wages Plaintiff would have earned at Foote Hospital had he not been terminated by Defendant and (1) the wages Plaintiff did earn during the time he was employed by Jackson County Medical Facility and (2) the wages Plaintiff might have earned had he continued to be employed by Jackson County Medical Facility from April, 1979, to the date of this final judgment. Defendant is therefore ordered to immediately pay to Plaintiff Fifty-Seven Thousand Six Hundred Eighty-Nine and 60/100 Dollars ($57,689.60) in back pay.

It is hereby ordered that upon entry of this judgment Defendant shall, in addition to the amount specified above, pay to the Plaintiff One Thousand Five Hundred Sixty and 00/100 Dollars ($1,560.00) in lost meal allowance and Nineteen Thousand Seven Hundred Fifty-Eight and 59/100 Dollars ($19,758.59) in interest.*

It is hereby ordered that Defendant shall pay to Plaintiff Twenty-Five Thousand and 00/100 Dollars ($25,000.00) in compensatory damages for emotional distress and suffering.

Accordingly, it is therefore ordered that, upon entry of this judgment, Defendant shall pay to Plaintiff in back pay, compensatory damages for emotional distress, lost fringe benefits, and interest, an amount equal to One Hundred Four Thousand Eight and 19/100 Dollars ($104,008.19).

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* The parties agree that subsequent to July, 1980, Plaintiff should receive interest at the rate of 12 percent per year compounded annually, consistent with M.C.L.A. 600.6013. Prior thereto, Plaintiff shall receive simple interest at 6 percent per year, which would be a total interest payment of $19,758.59.

II.

FURTHER EQUITABLE RELIEF

A. Reinstatement

It is hereby further ordered that Defendant shall reinstate Plaintiff to a position comparable to that of Assistant Department Head or an equivalent managerial position, as soon as such a position becomes vacant or is created.

B. Fringe Benefits

It is hereby further ordered that Defendant shall, upon entry of this judgment, reinstate Plaintiff as an Assistant Department Head for the purpose of accruing and receiving payment for all fringe benefits, including life insurance, health/accident/medical insurance, vacation pay, holiday pay, meal allowance, personal days, and any and all other fringe benefits to which an employee who currently holds the position of Assistant Department Head is entitled.

It is hereby further ordered that the Defendant shall immediately reinstate Plaintiff as a full participant in Defendant's employee health/accident/medical insurance plan and life insurance plan as though Plaintiff were currently employed as an Assistant Department Head. For the purpose of complying with the life insurance provision of this judgment, Defendant may purchase a life insurance policy for Plaintiff, and in Plaintiff's name, the beneficiary of which shall be designated by Plaintiff, with a face value equal to that of the life insurance Plaintiff would currently have had his employment with Defendant been uninterrupted.

C. Pension Benefits

It is hereby further ordered that the Defendant shall immediately place Plaintiff on the rolls of its applicable retirement and/or pension plan as a full participant and with credited years of service uninterrupted by the discharge of Plaintiff at W. A. Foote Memorial Hospital, or in the alternative, establish an individual retirement plan for Plaintiff that will guarantee that Plaintiff receives retirement benefits identical to those he would have been eligible to receive had his employment with Defendant been uninterrupted.

D. Front Pay

It is hereby further ordered that Defendant shall pay to Plaintiff front pay from the date of entry of this judgment until Plaintiff reaches the age of seventy years old, or until Plaintiff is reinstated to the position of Assistant Department Head or a comparable position, whichever occurs first, at the Defendant's established annual salary rate for Assistant Department Heads, together with such other compensation paid to Assistant Department heads, in each succeeding year, less Twelve Thousand Seven Hundred Fifty and 40/100 Dollars ($12,750.40).

Plaintiff may annually petition the court, beginning on or after July 1, 1983, for such an award. At the time of such petition, Defendant may present evidence concerning the amount of front pay Plaintiff should receive for the preceding year and Plaintiff may present similar evidence.

III.

ATTORNEYS FEES

It is hereby further ordered that Defendant shall pay to Plaintiff's counsel, the law firm of Dickinson, Wright, Moon, Van Dusen & Freeman, an amount equal to Forty-Two Thousand Two Hundred Twenty-Seven and 66/100 Dollars ($42,227.66), in attorney fees, costs, and expenses, plus interest thereon at the rate of 12 percent per year compounded annually until the same is paid in full.

IV.

INTEREST

It is hereby further ordered that Defendant shall pay Plaintiff interest on the judgment award as directed at Section I, *supra*.

V.

CONTINUING JURISDICTION OF THE COURT

It is hereby further ordered that the terms of this judgment shall be effective upon entry of the same, and this court retains continuing jurisdiction regarding the Plaintiff's future entitlements to front pay, reinstatement, and fringe benefits.

Dated at Detroit, Michigan

Date: August 30, 1982

ROBERT A. MOSSING
Clerk of Court

/s/ _____
Deputy Clerk

Form of judgment approved. Enter.

/s/ PATRICIA J. BOYLE
PATRICIA J. BOYLE
United States District Judge

Date: August 30, 1982

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 82-1879
No. 82-1888

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES H. GRUBB,
Plaintiff-Appellee,
Cross-Appellant,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC., a Michigan corporation,
Defendant-Appellant,
Cross-Appellee.

On Appeal from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 20, 1984

Before: ENGEL and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

WEICK, Senior Circuit Judge, delivered the opinion of the Court, in which WELLFORD, Circuit Judge, concurs. ENGEL, Circuit Judge, (pp. 30-32) delivered a separate dissenting opinion.

WEICK, Senior Circuit Judge. Defendant-Appellant W. A. Foote Memorial Hospital, Inc. (Hospital) appeals to this [1] Court, and Plaintiff-Appellee Charles H. Grubb (Grubb) cross-appeals, from a judgment of the U.S . District Court for the Eastern District of Michigan, after a bench trial in an action brought by Grubb against Hospital under Title VII of the

Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, the Civil Rights Act of 1870, 42 U.S.C. § 1981, and the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, and (through the pendent jurisdiction of the court) brought under Michigan common law and the Elliott-Larsen Civil Rights Act, Mich. Comp. Laws §§ 37.2101-.2804. Grubb filed this suit, after exhausting administrative remedies with the U. S. Equal Employment Opportunity Commission, U. S. Department of Labor, and Michigan Civil Rights Commission, alleging that the elimination of his position as assistant laundry director at the Hospital, and the consequent termination of his employment there, constituted race and age-based discrimination as well as a breach of an implied contract of employment under the doctrine of *Toussaint* v. *Blue Cross & Blue Shield*, 408 Mich. 579, 292 N.W.2d 880 (1980).

The District Court found in favor of Grubb on his claim of racial discrimination, but found for Hospital on Grubb's age discrimination and implied contract claims. 533 F. Supp. 671 (E.D. Mich. 1981). The final judgment of the District Court awarded Grubb $57,689.60 in back pay, $1,560.00 in lost meal allowance, $19,758.59 in interest, $25,000.00 in damages for emotional distress, and attorneys fees of $42,227.66 plus interest. Hospital was also ordered to reinstate Grubb for the purposes of all fringe benefits, and to pay "front pay" until he is reinstated to the same or a comparable position at Hospital or he reaches the age of seventy. However, the court did not require Hospital to reinstate Grubb to his job immediately.

For the reasons hereafter stated, we reverse the judgment in favor of Grubb for racial discrimination, and affirm the judgment in favor of Hospital denying Grubb's age discrimination and breach of implied contract claims. [2]

I.

Grubb was born of a black mother and white father in River Creek, Virginia, on March 4, 1916. He obtained a seventh-grade education in the Virginia schools, but was unable to attend high school on account of his race. However, he later acquired a high school graduate equivalency certificate while in the U. S. Army during the Second World War.

After the war, Grubb and his wife relocated to the area around Jackson, Michigan, where they have since remained and raised a family of six children. In 1957, after working as a Yellow Cab Company mechanic for ten years, Grubb went to work at the Sisters of Mercy Hospital (Mercy Hospital), where he served initially as a laundry worker who picked up soiled linen from hospital rooms. Four years later, in 1961, he was promoted to laundry manager. Although fairly inexperienced in laundry administration when he began, Grubb took numerous non-credit courses in laundry and general management sciences at local colleges, and he was ultimately certified as proficient by the American Institute of Laundry, a professional trade society. His lifelong struggle to improve himself made him the focus of an article in the local newspaper during the late 1960's.[1]

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[1] After his mother's death when he was only eight years old, Grubb, the eldest of three children, was often left in charge of the family whenever his father left home to work on the railroad. Beginning at age 16, he had to leave the family several times in order to find work and earn money with which to support his two younger sisters. On one of these occasions, Grubb worked for a farmer in Maryland for fifteen dollars a month plus room, board and clothing. Later, during the Great Depression, he served as a manual laborer in the Civilian Conservation Corps, at which time he helped build Seashore State Park near Virginia Beach, Virginia. After enlisting in the Army in 1941, Grubb ultimately became a chemical warfare instructor at Ft. Custer, and then served honorably with the artillery in France and Germany. His entire work record has shown an industry and determination to "get ahead in the world" which one may rightly deem admirable.

Throughout his service at Mercy Hospital (and later at Defendant Foote Memorial), Grubb was respected for his competence [3] and hard work, and always evaluated as average or better in his job performance.[2] Beginning in 1964, he was assisted by a laundry supervisor, Mrs. Rosella Fountain, a woman two years older than Grubb, who had worked in the laundry at Mercy Hospital since 1940. The two apparently worked well together, with Grubb having responsibility for the overall management of the laundry facility (including preparing the budget, ordering supplies, and maintaining quality control), while Mrs. Fountain directly supervised the laundry workers, occasionally helped with the laundry work herself, and performed employee scheduling.

In 1975, Defendant Foote Memorial purchased Mercy Hospital from the Sisters of Mercy. Effective September 1st of that year, Mercy became known as "Foote West" while the Defendant's original facility became known as "Foote East." The merger of the two institutions occasioned the consolidation of various services which had been performed at both hospitals, with a view toward eliminating redundancy and effecting cost savings. A committee was formed in December 1975 to study and make recommendations to Hospital's administration regarding consolidation of the laundries at the two facilities. Among the members of the committee were Grubb and Willard Carl (then aged 34 or 35), the manager of the laundry at Foote Memorial since 1973.

The committee's final report recommended that the two laundries be consolidated at one location, and that only one laundry manager and one assistant manager be retained. The supervisor position held by Mrs. Fountain (there had been no

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[2] Hospital does not dispute Grubb's overall qualifications and job performance.

comparable position at Foote Memorial) was to be abolished upon consolidation. However, between September 1975 and March 1976, the two laundries continued to function as before — entirely separately under the direction of their respective [4] managers. No action was taken to eliminate Mrs. Fountain's position.

There is no indication that the committee report was ever acted upon by Hospital administration; however, in March 1976, Mr. Carl was appointed Director of Laundry for both facilities, and Grubb was designated as assistant director.[3] For approximately one year after those appointments were made, Grubb continued to manage the laundry at Foote West, assisted by Mrs. Fountain as laundry supervisor, but Grubb was now required to report to Carl and follow his instructions.

In or about February 1977, Carl presented a proposed 1977-78 budget to his superior, Associate Hospital Administrator Harold Petke, in which he recommended elimination of the assistant director post (held by Grubb) and retention of the supervisor position (held by Mrs. Fountain) when the two laundries were physically consolidated into one facility at Foote East in the summer of 1977. When Petke (who had served as Grubb's immediate supervisor at Mercy Hospital) asked Carl about his reasons for abolishing Grubb's position, Carl replied that Mrs. Fountain was more cooperative, had longer years of laundry experience, and worked better with "the women" (the laundry workers) than Grubb, and that he needed a working supervisor who would be willing to "pitch in" occasionally and help with the laundering work. Carl told Petke that there "wasn't a place" for Grubb. (App. at 58).

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[3] Grubb does not contest the decision, in 1976, to make Mr. Carl, and not himself, the director for the combined laundry operation.

According to the trial testimony of Petke and the Hospital's personnel director, Gerald Culhane, Carl was given no objective criteria on which to base his decision regarding which supervisory position to eliminate in the consolidation process. Although Culhane "assumed" that Carl applied Hospital's usual layoff practice — considering the affected employees' [5] relative performance, potential and length of service — both Carl and Petke testified that they were unaware of any particular layoff policy, and Carl never considered placing Grubb in the supervisor job. Apparently Carl was given near-plenary authority over his department's budget, and his proposal was ratified as a matter of course by his superiors in Hospital's administration.

During the transition year from Carl's appointment as overall laundry director until the laundries were finally consolidated, there was apparent friction between Carl and Grubb. According to Grubb's later testimony, Carl began to deal directly with Mrs. Fountain (a white woman), and allegedly told Grubb that the supervisor would thenceforth report directly to him (Carl) since "[n]o black guy should be a boss over white women." (App. at 303). On another occasion, Carl apparently ordered Grubb to fire three minority (two black, one Hispanic) laundry employees before the Foote West laundry became unionized (the Foote East laundry had been unionized before the merger). According to Grubb, when he failed to follow that instruction, Carl said, "When are you going to fire those niggers?" (App. at 298).

At trial, Carl testified and denied making such racist remarks, and both Mrs. Fountain and Lurlene Osborne (one of the black women whom Carl wanted to fire) testified that they never heard Carl use racial epithets or saw him discriminate against minority employees. Although Mrs. Osborne acknowledged that Grubb had warned her about Carl's wish to fire the women, she said he did not tell her why. Up through

the date of his termination, Grubb never reported these alleged racist remarks to anyone in Hospital's administration.

Grubb also testified that, on several occasions, Carl made comments about Grubb's allegedly poor health, suggesting it was time for him to retire. And on one occasion when the two men disagreed over the type of bed sheet to use, Carl [6] allegedly remarked, "Well, I know you are old and set in your ways." (App. at 301). At that time, Grubb was 60 or 61 years old.

From February 1977 until July 1977, rumors began to spread that Grubb's position would be eliminated. These rumors reached him through subordinates and fellow employees. Although Carl informed Mrs. Fountain, as early as April of that year, that she would be retained at the new facility (and, at least by implication, that Grubb would not), he never formally advised Grubb about his intentions, nor could he explain at trial why he did not do so. Grubb, not having been told anything officially, and having been told by administrator Petke that Carl would have to have documented reasons for firing him, decided to wait and see what happened.

Finally, in July 1977, Grubb finished overseeing the transfer and disposition of the equipment from the laundry at Foote West, and reported to what he thought would be his new office at Foote East. Instead, he found that the office had been turned into a lunchroom. Soon after, Carl called Grubb into his office, handed him a termination notice, and said, "You can call this fired or whatever you please. You are done." (App. at 292).

Although Plaintiff then went to the personnel director, Culhane only processed his termination[4] and generally suggested that he might obtain work as a laundry truck driver for Hospital. Also, according to Grubb, Culhane told him that there was a grievance policy, leading ultimately to Hospital's president, but that it was "no use" going to the president about his situation. (App. at 293). [7]

II.

After Grubb was terminated from Hospital, he was unemployed for nearly two years until he took a similar job at the Jackson County Medical Care facility. He worked there from April 1979 until July of that year, when he voluntarily resigned (due to low pay and disagreement with his superiors' labor policies) and accepted early retirement under Social Security. In the meantime, he had filed charges with the federal and state agencies administering employment discrimination laws, raising for the first time his claim that his termination from Hospital was due to race and age discrimination. Subsequently, on February 16, 1979, he filed his complaint in the present action, seeking reinstatement at Hospital, injunctive and declaratory relief from further discrimination, back pay and benefits, $250,000.00 in punitive damages, and other compensatory relief (including damages for emotional pain and suffering).

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[4] It appears that Culhane initially treated Grubb's situation as a lay-off, but then made it a final termination when it appeared that there were no available jobs in which Grubb would be interested. Also, Grubb was unable to receive severance pay until the termination was made final. However, as a consequence, Grubb was never contacted about later job openings at the Hospital (including the time when Carl left to take a job in Memphis, but returned unexpectedly after about six months).

The case came to trial, on June 2-8, 1981, before District Judge Patricia J. Boyle. During the five trial days, eight witnesses (including Grubb) testified, and a considerable volume of documentary materials was submitted to the court. Then, on October 30, 1981, the court filed an opinion and order granting judgment in favor of Grubb. Judge Boyle found that the manner in which Carl informed Grubb of the elimination of his job showed animus toward him, and that Carl's racially derogatory remarks, reported in Grubb's credited testimony, showed that the basis for that animus was Grubb's race. Although she did not find that Petke's and Culhane's acquiescence in Carl's decision was prompted by discriminatory motives, Judge Boyle held that Hospital violated Title VII, section 1981, and the Michigan civil rights act when it relied almost entirely on Carl's subjective (and unlawfully motivated) evaluation.

The court did not, however, find age discrimination to be present in this case, holding that "[t]he single remark regarding [8] age [Carl's statement to Grubb that he was 'old and set in his ways'] . . . does not persuade me that age was a causal factor in the action taken, particularly when considered with the fact that Ms. Fountain was approximately 63 years old at the time Mr. Carl selected her position for retention." 533 F.Supp. at 675. She also declined to extend the Michigan decision in *Toussaint* v. *Blue Cross & Blue Shield*, *supra*, to a situation involving the elimination of an employee's position rather than a discharge from a continuing position, and thus denied Grubb's state-law breach of contract claim.[5]

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[5] In *Toussaint*, the Michigan Supreme Court held that an established company policy not to discharge employees except for cause could give rise to a contractual duty, on the part of the employer, to follow that policy.

See part V of this opinion, *infra*.

In subsequent unpublished orders, the District Court reduced the award of back pay by the amount Grubb would have earned had he not terminated his employment at the Jackson County facility,[6] and ruled that immediate reinstatement was inappropriate since it could result in Mrs. Fountain's displacement and thus "engender hostility not conducive" to voluntary compliance with anti-discrimination laws. (App. at 540). After final judgment was entered by the court on August 30, 1982, Judge Boyle denied Grubb's motion for immediate reinstatement,[7] and denied successive defense motions for reopening of, or relief from, the judgment.

Hospital appealed from the final judgment in favor of Grubb, and Grubb cross-appealed from the court's denial of his age [9] discrimination and contract claims, as well as the reduction of his back pay award and denial of punitive damages. By order entered February 18, 1983, the monetary aspects of the judgment were stayed by the District Court pending this appeal.

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6 The October 30th order had already reduced the back pay award by the amount ($3,600.00) that Grubb had actually earned at the later job. 533 F. Supp. at 676.

7 By this time (November 15, 1982), Mr. Carl had again resigned from Hospital, Mrs. Fountain had retired, and the supervisor position was eliminated as another economic measure. Judge Boyle, however, considered the elimination of the supervisor position to be a legitimate business decision, and deemed the court powerless to place Grubb in a higher position (i.e., the director's post) than the one he previously held.

III.

We come first to the District Court's holding that Hospital engaged in unlawful racial discrimination by permitting the elimination of Grubb's job based on Willard Carl's racially-biased recommendation. After a review of the entire record in this case, this Court must conclude that the finding was not supported by substantial evidence and is clearly erroneous.

A.

As this is a case alleging racially discriminatory treatment, we should apply the basic allocation of burdens of proof set forth by the Supreme Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981). Under those decisions, the Title VII plaintiff must first prove, by a preponderance of the evidence, a prima facie case of discrimination.[8] Then, if the prima facie case is shown, the defendant [10] must articulate, through admissible evidence, a

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[8] In *McDonnell Douglas*, the Court set, as a model for such a prima facie case, the requirement that the plaintiff show:

(1) that he belongs to a racial minority;

(2) that he applied and was qualified for a job for which the employer was seeking applicants;

(3) that he was rejected despite his qualifications; and

(4) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualification.

411 U.S. at 802. Since this model was formulated in the context of a discriminatory hiring case, it must be applied *mutatis mutandis* to other instances of alleged race discrimination "with respect to . . . terms, conditions, or privileges of employment." 42 U.S.C. §2000e-2 (a)(1) (1976). *See Burdine*, 450 U.S. at 253-54 n.6.

legitimate, non-discriminatory reason for the action taken. Finally, if the defendant carries this burden of production, the plaintiff must then prove, by a preponderance of the evidence, that the articulated reason was pretextual and not the true reason, either by showing that a discriminatory reason was the more likely motivation, or by showing that the articulated reason is unworthy of belief. *Burdine*, 450 U.S. at 256; *Fields* v. *Bolger*, 723 F.2d 1216, 1219 (6th Cir. 1984). This allocation of the respective burdens may also be applied in the adjudication of race discrimination claims arising under 42 U.S.C. § 1981, *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 n.11 (6th Cir. 1974), and Michigan's Elliott-Larsen Act, *Michigan Civil Rights Commission ex rel. Boyd* v. *Chrysler Corp.*, 80 Mich App. 368, 375 n.4, 263 N.W.2d 376, 380 n.4 (1977); *see generally Department of Civil Rights ex rel. Parks v. General Motors Corp.*, 93 Mich. App. 366, 375, 287 N.W.2d 240, 244 (1979) ("Federal law provides a good general source for interpreting state civil rights legislation because of the great number of decided cases."), *aff'd*, 412 Mich. 610, 317 N.W.2d 16 (1982).

However, the essential factual inquiry in such a case is still "'whether the defendant intentionally discriminated against the plaintiff'" *U.S. Postal Service Board of Governors* v. *Aikens*, 103 S. Ct. 1478, 1482 (1983) (quoting *Burdine*, 450 U.S. at 253). The findings of the trial court on this issue are subject to review only under the "clearly erroneous" standard of Civil Rule 52(a). *See Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

B.

In the case before us, it appears that the parties met their respective burdens under the first two steps of the *McDonnell Douglas/Burdine* analysis. Grubb proved: (1) that he was [11] black; (2) that he was qualified for retention in Hospital's employ as either an assistant laundry director or a laundry supervisor; (3) that he was not so retained despite his qualifications; and (4) that Hospital instead retained as laundry supervisor a white person whose general qualifications were no greater than Grubb's.[9] Hospital, on the other hand, introduced testimony by Willard Carl and Harold Petke which explained the decision to retain Mrs. Fountain, rather than Grubb, as being motivated by Carl's need for a working supervisor, not another manager, and by a view that Mrs. Fountain had performed that role well for many years and should logically be retained therein. Therefore, the judgment of the District Court had to rest on whether or not Grubb carried "the ultimate burden of persuading the court that [h]e has been the victim of intentional discrimination." *Burdine*, 450 U.S. at 256.

"In short, the district court [had to] decide which party's explanation of the employer's motivation it believe[d]." *Aiken*, 103 S. Ct. at 1482. As noted above, Judge Boyle found that Carl's actions evidenced animus against Grubb, and that Grubb's testimony about alleged racist comments by Carl

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[9] It should be noted, however, that Mrs. Fountain had greater seniority in the Mercy Hospital laundry, having served there since 1940 while Grubb only started there in 1957. But once the Hospital carried its burden of production it was no longer relevant whether or not Grubb had actually made out a prima facie case. *See Aikens*, 103 S. Ct. at 1482. Judge Boyle apparently felt that he did so, in light of her denial of a directed verdict for Hospital at the close of Grubb's proofs. *See id.* at n.4.

established the unlawful nature of that animus. She further concluded, without further weighing of the evidence, that "while Defendant may have had a valid economic reason for the elimination of a supervisory position in the laundry, it does not follow that the decision to terminate Mr. Grubb would have been reached despite Mr. Carl's unlawful animus." 533 F. Supp. at 675. This conclusion is defective for two reasons: (1) it gives considerably greater weight to Grubb's testimony than [12] was due; and (2) it has the effect of changing the nature of Hospital's burden under *Burdine*.

As pointed out by Judge Martin of this Court in the recent case of *Brooks* v. *Ashtabula County Welfare Department*, 717 F.2d 263, 267 (6th Cir. 1983), the district court in a Title VII disparate treatment case cannot require the defendant to *persuade* the court that the legitimate reason articulated by said defendant actually motivated the employment decision at issue. It is the *plaintiff's* burden to persuade the court "that the asserted reason is pretextual." *Fields*, 723 F.2d at 1219. But the effect of the District Court opinion in this case was to require proof (presumably by the defendant Hospital) that the decision to eliminate Grubb's job "would have been reached" regardless of any racism on Carl's part.

Although Grubb testified that Carl had exhibited racial bias on at least two occasions, there is no other evidence in the record of racial bigotry on his part, or that of any other Hospital official. The evaluation of Grubb's work made by Mr. Carl in early 1977 (App. at 628–29) does not evidence any propensity by Carl to act according to his alleged racial bias, even though the subjective nature of such an evaluation would give him an opportunity to do so. A comparison of that evaluation with those made by Harold Petke when he was Grubb's immediate superior at Mercy Hospital (App. at 630–88) fails to show any significant change in how Grubb's job performance was viewed. Judge Boyle specifically found

no evidence of discriminatory motives in either Petke or Culhane, the two other administrators most directly involved in Grubb's termination. Both Mrs. Fountain and Ms. Osborne, with whom Grubb acknowledged being on friendly terms, could recall no incidence of discrimination by Carl, and Ms. Osborne (whom Carl allegedly wanted to fire, and referred to as a "nigger") stated that she and Carl were friendly and would occasionally visit each other's homes. Furthermore, Grubb never complained about Carl's alleged racism to any-[13]one in Hospital's administration, or even filed a formal grievance on that basis when his position was eliminated.[10]

It is true, of course, that an employer may be held liable under Title VII "for the discriminatory actions of its supervisors which affect the tangible job benefits of an employee on the basis of race." *Henson* v. *City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982). But this operation of the doctrine of respondeat superior should not dissuade the court from requiring the Title VII plaintiff to prove his case, particularly where (as here) an eleemosynary institution stands at risk for high amounts of damages and attorneys fees, and there were legitimate, nondiscriminatory reasons for its eliminating unnecessary expenses

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[10] Although personnel director Culhane may have dissuaded Grubb from pursuing the grievance procedure — telling him it was "no use" going to the hospital president — there is nothing in the record to show that Culhane was aware that Grubb objected to his termination on grounds of race or age discrimination rather than mere dissatisfaction with the decision *per se*.

We do not consider significant, in light of the lower court's finding of no discriminatory intent on the part of other Hospital officials, any alleged failure to follow Hospital's policies with regard to layoffs (see part V *infra*). Mr. Carl took no apparent part in those decisions; his role in these events ended with his handing the termination notice to Grubb. Therefore, his alleged unlawful animus cannot be imputed to any later occurrences.

and pursuing the course it did in a combined facility. Although Grubb's testimony, when viewed in isolation, could be substantial evidence for the District Court's finding of racial animus, that finding must be reviewed in light of the entire record, and reversed when it is against the clear weight of the evidence. *Johnson* v. *United States*, 600 F.2d 1218, 1222 (6th Cir. 1979). *See also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2585, at 731, 735 (1971).

Grubb's counsel cited, at oral argument, to *Bell* v. *Birmingham Linen Service*, 715 F.2d 1552 (11th Cir. 1983), for the proposition that direct evidence of discriminatory intent, when presented by a Title VII plaintiff, will shift to the employer the burden of *proving* (not merely *producing*)[14] legitimate, nondiscriminatory reasons for its action. However, *Bell* is distinguishable since the plaintiff there was confronted, when she applied for a "washman" position at the defendant's plant, with a statement that if she were given the job "every woman in the plant would want to go into the washroom." *Id.* at 1553. In the case at bar, there is no evidence that Carl or any other Hospital official made any racially derogatory remark, or gave other direct evidence of discriminatory intent, in connection with the actual decision to eliminate Grubb's job.

Moreover, the court below failed to appreciate the strength of Hospital's proffered reason for Grubb's termination. Prior to the acquisition of Mercy Hospital by Foote Memorial (and even after the acquisition but before Carl's appointment as overall director), Grubb and Carl each held essentially equivalent positions in their respective hospital laundries. In particular, each of them took care of the managerial and administrative aspects of the laundry operations (preparing budgets, ordering supplies, setting work standards, hiring and firing laundry workers). At Mercy (and later Foote West), Rosella

Fountain acted as a direct supervisor of the day-to-day work in the laundry, observing the employees' job performance, setting work schedules, and generally seeing that the laundry work was actually done (even performing such work herself, when necessary). Since Carl did not have a supervisor under him at Foote East, he presumably did some of those things himself, but his appointment as laundry director for the combined hospitals clearly established him in the administrative role.

Although the transitional situation of two separate laundries, on two opposite sides of town, reasonably required the presence of a second manager at Foote West (since Carl could not be at two places at once), the consolidation of the laundry facilities at Foote East in 1977 eliminated the need for an additional administrator. However, it was likely that [15] the size of the combined laundry would necessitate the employment of an "on-line" supervisor, under Mr. Carl, who could directly oversee the laundry employees on a continuous basis. Such a role was already being performed by Mrs. Fountain, and had been for some 13 years. Therefore, she was a logical choice for retention when one of the two lower supervisory employees in the laundry had to be eliminated in the consolidation.

Grubb, and the District Court, make much of the "subjective" nature of the criteria used by Carl in reaching his decision on which position to eliminate.[11] Besides the fact that subjectivity of evaluation is not a *per se* indicator of discrimination,[12] we note that Carl's criteria were not wholly subjective. It was an objective fact that Grubb and Carl had performed the same function at the two hospitals, and that only one person would be needed to perform that function at the combined facility. It was also an objective fact that Rosella Fountain was already working as the kind of supervisor Carl would still need in the laundry. To the extent that [16] he also considered Mrs. Fountain to be more "cooperative" and better able "to work with the women" than Grubb, he was employing subjective judgment. But that subjectivity, without substantial proof of racial bias *in its exercise,* does not constitute unlawful discrimination.

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[11] The descriptions of these criteria in Mr. Petke's testimony (App. at 51–54) and Mr. Carl's testimony (App. at 230–38) at trial are admittedly imprecise, but they essentially boiled down to a determination that Mrs. Fountain's experience in directly supervising the laundry workers, and in scheduling their work hours and daily activities, was needed more in the consolidated laundry than Grubb's experience in overall management of a laundry facility, a task Carl considered himself capable of doing.

[12] *Brooks*, 717 F.2d at 267–68; *Ward* v. *Westland Plastics, Inc.*, 651 F.2d 1266, 1270 (9th Cir. 1980); *Roman* v. *ESB, Inc.*, 550 F.2d 1343, 1354 (4th Cir. 1976); *Rich* v. *Martin Marietta Corp.*, 522 F.2d 333, 338–39 (10th Cir. 1975).

Although Judge Boyle cites *Long* v. *Ford Motor Co.*, 496 F.2d 500, 506 (6th Cir. 1974), and *Rowe* v. *General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972), it should be noted that *Rowe* (cited in support of the dicta in *Long*) dealt with allegations of disparate impact on minorities by a facially neutral policy, *not* a case of alleged disparate treatment due to intentional discrimination. Although subjective evaluations may give greater leeway to personal bias, they do not have the importance in disparate treatment cases (like this one) that they have in disparate impact cases where subjectivity can provide the crucial link between employment statistics unfavorable to minorities and a showing that those statistics reflect unlawful discrimination. *Ward*, 651 F.2d at 1270 n.1.

It is also contended that Carl's alleged criteria were a sham because they were not applied to Grubb. This argument ignores the fact that Carl was not required to choose whether to retain Mr. Grubb or Mrs. Fountain in the same type of position, but rather whether to retain an assistant laundry director or a laundry supervisor. Carl's standards *were* applied to Grubb, in the sense that it was determined that he was performing duties that Carl himself could perform in the consolidated facility, and thus the assistant director position would be superfluous. And to hold that Carl and Hospital should have "bumped" Mrs. Fountain from her job, and replaced her with Grubb, would interfere with a legitimate management decision to retain an employee in a position which she had well and faithfully performed for many years. Also, such a decision could well have left Hospital open to a sex discrimination charge instead.

From an examination of the trial testimony of the two individuals, we come away with a picture of a rivalry caused when a man is suddenly placed into a superior position over another man. Both gentlemen originally held analogous positions in their respective laundries, but the administrative restructuring after the merger no doubt left a certain amount of resentment in Mr. Grubb, who might have received the higher post himself, and likewise left Mr. Carl, a man with perhaps less experience, in an insecure position where he had to contend with Grubb's ideas of how things should be done. This impression is fortified by the following testimony given by Plaintiff at trial:

> Q Now, do you believe that Mr. Carl let you go because he thought if you stayed you would show him up?[17]
>
> A Yes, sir.
>
> * * *
>
> Q Why do you believe that was the problem?

> A Well, there were things that go in the laundry that only one familiar with the functions of a laundry operation. There are many functions and those functions are phases, now, systems now, that I see that were going on within that department that would have been corrected, should have been corrected long before I went over there. I thought that some of the things I mentioned to Mr. Carl and Mr. Carl said the laundry had run that way; it was running good and that it was running fairly good, but it could have been improved. You could improve on most anything. For those reason [sic.], I think Mr. Carl didn't want me to implement those things.

(App. at 324).

Taken altogether, we cannot help but find that Grubb failed to prove, by a preponderance of the evidence, that a racially discriminatory purpose was the more likely motivation for the decision to eliminate his job, or that Hospital's proffered reason for that decision is unworthy of credence. It appears from the record that Willard Carl did bear considerable animus toward Grubb (and the reverse may also be true), and our holding should not be construed to say that Grubb, a man who has led a productive and meritorious life, was fairly treated by Carl. However, a personality conflict between two individuals which leads to an unfortunate result does not automatically imply unlawful racial discrimination actionable under civil rights statutes just because the loser in that conflict happens to belong to a racial minority. In view of the weakness of Grubb's evidence of discriminatory motivation for his discharge, and the strength of Hospital's explanation for its decision, we must — when faced with the District Court's finding on this issue — be [18] "left with the definite and firm conviction that a mistake has been committed." *United States* v. *U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

Even if we must credit the District Court's finding of fact that Willard Carl made the two racially derogatory remarks to Grubb, the District Court was erroneous in relying solely on these remarks for its finding of racial animus in regard to the decision to eliminate Grubb's position. The following testimony by Grubb indicates that Carl's question to him, "When are you going to fire those niggers?", was made more out of anti-union animus than racially motivated animus:

> When they found out that Foote Hospital was sold, they went to investigating and applying for union membership . . . . So, Willard Carl found out that [Lurlene Osborne] was the ringleader . . . [S]o he said to me that "I want you to fire [Osborne and two other minority employees]". . . . I didn't do anything . . . on that order. A week came by and he [Carl] came back . . . . We started out the door . . . and he said to me . . . "When are you going to fire those niggers?"

(App. at 297–98). Carl was asking Grubb to fire these employees, *not because they were black*, but because of their union activities, albeit in a racially derogatory manner. The expressions used were offensive, uncalled for, and, at the same time, out of character based on all the other proof in the case.

In addition, it appears that the District Court based its decision, to credit Grubb's testimony that Carl directed Mrs. Fountain to report to him because "[a] black man has no place supervising white women," on an erroneous finding. The District Court found that it was "undisputed" that Carl directed Fountain to report to him, but Fountain clearly testified that she continued reporting to Grubb while they were still at West: [19]

Q Did you continue to report to Mr. Grubb [while you were still at West]?

A Yes, sir.

(App at 348). Grubb himself also testified that Fountain continued reporting to him until they were "completely moved," at which point Grubb's position was terminated. Even if Carl told Grubb black men should not supervise white women, this statement had *no effect* on Grubb's *position* or his supervisory status over Fountain since Fountain continued to report to him; it was, again, entirely inconsistent with Carl's conduct in dealing with Grubb and Fountain.

IV

We turn next to the District Court's conclusion that the evidence adduced at trial did not show that the elimination of Grubb's position was motivated by unlawful age-biased discrimination. For the following reasons, this Court holds that said conclusion was supported by substantial evidence and is not clearly erroneous.

It is not necessary, under the Age Discrimination in Employment Act (ADEA), for a plaintiff to establish a prima facie case using the factors laid down in *McDonnell Douglas, supra,* with respect to Title VII cases.[13] *Blackwell* v. *Sun Electric Corp.*, 696 F.2d 1176, 1179-80 (6th Cir. 1983); *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975). The preferred approach, supported in the legislative history of the Act, is to determine the existence of a prima facie showing of age discrimination on a case-by-case basis. *Sahadi* v. *Reynolds Chemical,* 636 F.2d 1116, 1118 & n.3 (6th Cir. 1980).

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[13] See note 9, *supra.*

The Ninth Circuit has developed a reasonable and flexible standard for making such a determination: To establish a [20] prima facie case, the plaintiff must prove, by the preponderance of the evidence, that he was within the protected class (persons between the ages of 40 and 70), and was performing satisfactorily, and that he was discharged "'under circumstances which give rise to an inference of unlawful discrimination.'" *Douglas* v. *Anderson*, 656 F.2d 528, 531 (9th Cir. 1981) (quoting *Burdine*, 450 U.S. at 253). This last requirement might be met "by using the *McDonnell Douglas* criteria. . . [or by] using statistical information, direct evidence of discrimination, and circumstantial evidence other than that which is used in the *McDonnell Douglas* criteria." *Blackwell*, 696 F.2d at 1180. If a prima facie case is established by the plaintiff, the burden of production of a legitimate, nondiscriminatory reason shifts to the employer, but the plaintiff nevertheless retains the burden of proving that he was discharged because of his age. *Id.; Laugesen*, 510 F.2d at 313. The same evidentiary burdens apply to age discrimination cases brought under the Elliott-Larsen Act. *Gallaway* v. *Chrysler Corp.*, 105 Mich. App. 1, 5, 306 N.W.2d 368, 370–71 (1981).

Since the "ultimate issue is whether age was a factor in [Carl's decision] and whether [Grubb's] age. . . made a difference in determining whether he was to be retained or discharged," *Ackerman* v. *Diamond Shamrock Corp.*, 670 F.2d 66, 70 (6th Cir. 1982), and since Grubb failed to prove that his age was such a determining factor, we need not specifically examine whether or not he met the initial burden of a prima facie case. Either in the prima facie showing, or in his attempt to rebut Hospital's asserted reason for his termination, Grubb's proofs did not give rise to or sustain a reasonable inference that Carl was motivated by age bias.

The only potential evidence of such bias was Carl's alleged statement that Grubb was "old and set in his ways," and various instances where Carl allegedly made comments about Grubb's health and encouraged him to retire. The meaning of [21] these remarks is ambiguous at best, and — when considered with the logic of a decision to eliminate Mr. Grubb's job rather than Mrs. Fountain's[14] — does not support a finding that age was a motivating or determining factor.

It may not be necessary, in the context of a reduction-in-force case, for the plaintiff to show that he was replaced by an individual outside the ADEA-protected age group, *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 462 (5th Cir. 1982), and "replacement by even an older employee will not necessarily foreclose prima facie proof if other direct or circumstantial evidence supports an inference of discrimination," *Douglas* v. *Andersen*, 656 F.2d at 533. But the relative age of the retained employee will affect the likelihood that such an inference can be reasonably drawn. *Id.* We agree with the court below that "the fact that Mrs. Fountain was approximately 63 years old at the time Mr. Carl selected her position for retention," 533 F. Supp. at 675, severely undercut the likelihood of Carl's decision being predicated on age bias.

Telling Grubb that he was "old and set in his ways," in the context of a dispute over which kind of sheet to use on the hospital beds, appears to reflect Carl's recognition that Grubb was stubborn in insisting that his way to manage the laundry (including the type of bed sheet to purchase) was the correct way. Also, the remarks about retirement were, according to Grubb's own testimony, connected with his increasingly frequent absences from work due to health problems. If Carl were otherwise disposed to eliminate Grubb's position, he

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[14] See part III(B) of this opinion, *supra*.

might well have tried to persuade him to retire and thus avoid a confrontation when the position was abolished in the new budget.

It appears (as in the claim of race discrimination) that some of Carl's actions — particularly his handling of the actual [22] termination — evidence a personal hostility toward Grubb himself, not prejudice against a black man or a man in his sixties. He may have perceived Mr. Grubb as a rival for authority in the laundry, or perhaps as an obstacle to his plans for the laundry, but "[p]ersonality conflicts alone cannot supply a basis for an ADEA claim." *Ackerman*, 670 F.2d at 70. Even Grubb recognized, as a past administrator, that reductions in the labor force provide an opportunity to eliminate those employees "that might cause you the most trouble." (App. at 326). A subjective judgment to discharge an employee can be made for any nondiscriminatory reason, *Ackerman, supra*, and that reason "need not meet the unqualified approval of the judge or jury," *Douglas* v. *Andersen*, 656 F.2d at 534. Therefore, we uphold Judge Boyle's denial of Grubb's age discrimination claim.

V.

Finally, we come to Grubb's pendent claim asserting that Hospital's failure to observe its alleged layoff policies with respect to his termination constituted a breach of implied contract under Michigan law. The District Court entered judgment for Hospital on this claim, and we affirm.

A.

Although Judge Boyle permitted Grubb to amend his complaint at trial in order to add the breach of contract claim, she ultimately declined to extend the doctrine of *Toussaint* v. *Blue Cross & Blue Shield, supra*, to the facts of this case, absent further guidance from the Michigan courts. Thus, the District Court may be seen to have decided ultimately not to exercise its jurisdiction over the implied contract claim.[15] [23]

A state law claim asserted in the same action with a federal claim may be heard and decided by the district court, provided that (1) the federal claim is substantial, and the state and federal claims derive from a "common nucleus of operative fact," and (2) the court exercises its discretion to decide the state-law issues. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725-26 (1966); *Ray* v. *Tennessee Valley Authority*, 677 F.2d 818, 825 (11th Cir. 1982), *cert. denied*, 103 S. Ct. 788 (1983). Once the first part of this test is met,[16] the court should weigh "considerations of judicial economy, convenience and fairness to litigants," 383 U.S. at 726, in determining whether to exercise jurisdiction.

In making that determination, the court should avoid "[n]eedless decisions of state law . . . both as a matter of comity and to promote justice between the parties, by procuring

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[15] This conclusion is reinforced by the fact that the court only dealt with this claim in a footnote at the outset of the opinion. 533 F. Supp. at 672-73.

[16] We may assume, without deciding, that the alleged breach of contract arose from the same "nucleus of operative fact" (the termination of Grubb's employment at hospital) as his federal-law claims, and thus the District Court had the power to exercise pendent jurisdiction in this case.

for them a surer-footed reading of applicable law." *Id.; Financial General Bankshares, Inc.* v. *Metzger*, 680 F.2d 768, 772-73 (D.C. Cir. 1982); *Jackson* v. *Stinchcomb*, 635 F.2d 462, 473 (5th Cir. 1981). This rule is based on "the desirability of having a reliable and final determination of the state claim by state courts, having more familiarity with the controlling principles and the authority to render a final judgment." *Hagans* v. *Lavine*, 415 U.S. 528, 548 (1974).

Here, Grubb sought to apply the *Toussaint* doctrine — under which an employer's established policy to discharge employees only for cause could give rise to an enforceable contractual right — to the layoff context. He argues that Hospital's policies with regard to layoffs were violated when he was permanently discharged (and not merely placed on layoff status) upon the elimination of his job, and also when he was not considered for [24] later openings at Hospital for which he was qualified. Assuming *arguendo* that Hospital *had* such an established policy, and that said policy was violated as to Grubb, it nevertheless appears that Michigan courts have not, as yet, extended *Toussaint* to situations not involving a wrongful discharge from a continuing position.

Although, as the court below admits, the language of the *Toussaint* opinion may well be broad enough to encompass employer policies governing conditions under which an employee can be laid off for economic reasons, we can understand the reluctance of the District Court to take the initiative and "lead" the Michigan courts in that direction. Our respect for the role of the state courts as the principal expositors of state law counsels restraint by the federal court in announcing new state-law principles, or applying such principles to novel situations. Expanding the scope of the *Toussaint* doctrine to the facts of this case would entail imposition of an implied contractual duty on an employer to *rehire* an employee whose services had no longer been needed, and not merely to *refrain* from

arbitrarily discharging an employee. The reach of such a duty has yet to be presented to, and determined by, the Michigan state courts, and the unsettled nature of the state law on this issue was an entirely appropriate factor for the District Court to consider in exercising its broad discretion in hearng pendent state-law claims. *Moore* v. *County of Alameda*, 411 U.S. 693, 716 (1973). We cannot say that such discretion was abused in this instance.

B.

The entry of judgment for Hospital on the contract claim may also be supported on the merits, assuming that *Toussaint* could properly apply to these facts. The evidence presented at trial does not appear to show that any layoff policy or practice established during Grubb's tenure at Hospital was violated in his discharge. [25]

The Michigan court explained the implied obligation recognized in *Toussaint*, using the following language:

> While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to

create an environment in which the employee believes that, whatever, the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."

408 Mich. at 613, 292 N.W.2d at 892.

Grubb first contends that Foote Memorial Hospital Policy No. 355[17] was violated when he was (1) not placed on layoff [26] status but was instead permanently terminated, and (2) not recalled when vacancies thereafter arose at Hospital. This argument overlooks the fact that the specifics of this

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[17] Policy No. 355 provides, in pertinent part, as follows:

II. DEFINITIONS

A. *Layoff:* Layoffs are granted to staff members who are employed in departments which cannot continue their employment due to such reasons as: . . .(2) a reorganization which results in the elimination of a particular position(s).

* * *

III. REGULATIONS

* * *

C. Recall

1. Every attempt will be made to recall laid off employees as soon as possible. Recall may not necessarily be for the same position the employee left.

* * *

IV. PROCEDURE

A. Reduction of Staff Members

Responsibility	*Action*
Department Head	1. Notify the Personnel Department when it is determined that it is necessary to reduce staff.

(footnotes continued on next page)

policy were not established in written form until July 1, 1978, an entire year after Grubb was discharged. And Hospital's personnel director, Gerald Culhane, testified at trial that the principles of the written policy were only generally followed prior to that date since layoffs were "just something that generally didn't exist before that." (App. 177). Moreover, Grubb never testified that he had even a "subjective expectation" that any [27] policy or practice would be followed regarding layoffs at Hospital. Absent any clear showing that Hospital, prior to Grubb's termination, had established a policy with any set requirements, whether through written or oral statements or through past practice, we cannot see how it created a situation "instinct with an obligation" to Grubb.

(footnotes continued from previous page)

Personnel Office	2. Assist the department head in determining which staff members will be affected. a. Remove affected staff members in affected classifications in order of their qualifications in terms of performance and potential. b. Where qualifications are considered equal, length of service will recieve [sic.] preference.
Department Head	3. Inform affected staff members with a written notice of layoff, with a copy to Personnel for inclusion in the staff member's file.
Personnel Office	4. Refer staff members as candidates for vacant positions within the department for which they are qualified. 5. Refer staff members as candidates for vacant positions throughout the Hospital for which they are qualified.

(App. at 600-02).

Additionally, Grubb relies on the following statement in Hospital's employee handbook (which had been in distribution since 1976):

> If a reduction in work force of a department is necessary, layoffs will be carried out along the lines of seniority, providing those persons can satisfactorily perform the duties required. Every consideration will be made for possible transfers to positions in other departments for which you might qualify. It is also hoped that any layoffs would be on a temporary basis.

(App. at 773). In response to this, we note again that Mrs. Fountain had greater seniority in the laundry department than Mr. Grubb, and nothing in the record shows that any relevant position in another department was available in July 1977. Hospital's expression of "hope" that layoffs would be temporary cannot, by itself, reasonably support an implied obligation to recall laid-off employees, absent any evidence that Hospital had, in practice, recalled such employees whenever a relevant position opened up in the future. An important factor present in this case is that Hospital was then undergoing the process of consolidation and restructuring following the merger of the two institutions. To expect clear and firmly established personnel policies during such a period is somewhat unrealistic, and we find none on which Grubb can base his claim for relief. [28]

VI.

Accordingly, the judgment of the District Court, insofar as it finds for Plaintiff on his claim of racial discrimination and grants monetary and other relief thereon, is REVERSED. In all other aspects, the judgment is AFFIRMED, and the cause is REMANDED to the District Court for dismissal of Plaintiff's complaint. [29]

ENGEL, Circuit Judge, dissenting. I respectfully dissent. As have my colleagues, I have carefully examined the district court record. I, however, reach a different conclusion.

It is difficult enough to bring the reality of a complex human dispute such as this into the trial courtroom. It is even more difficult to reconstruct that reality from a transcript of the trial. It is this double removal from reality which makes the clearly erroneous rule so necessary a requirement of appellate review.

There is no need to quarrel with the detailed recitation of facts in the majority opinion, which is but a summary of the extensive testimony and documentary evidence heard by Judge Boyle in this five day bench trial. The motives behind the Hospital's action in discharging Charles W. Grubb were probably mixed, and it is possible to draw a number of differing and even conflicting inferences from the proof. The discharge may have been prompted by business necessity, by animus against Grubb because of his personality, or by a deep-seated resentment against him because of his advanced age or his race. As the facts recited in the majority opinion make clear, there was evidence from which any of the foregoing conclusions could have been reached by the trial judge, the person to whom the law has assigned the task of unscrambling the facts and ascertaining the truth.

According to the majority, the district court opinion improperly implied that the Hospital had the burden of proving that Grubb would have been discharged even in the absence of racial animus. The majority emphasizes that the ultimate burden of proof should have been placed on the plaintiff. Yet the district judge did just that. She stated her conclusions as follows:

> Assuming arguendo that the Plaintiff must prove that race or age was a determining factor in the employer's decision in

the sense that "but for" the employer's motive to discriminate the action would not have been taken, [30] *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1019 (1st Cir. 1979), Plaintiff has succeeded in persuading the Court that Mr. Carl's selection of Mr. Grubb for termination was made for unlawful reasons. Necessarily, if the fact finder is persuaded that race and/or age was a determining factor in the decision, it cannot be concluded that "the employer also had a lawful nondiscriminatory motivation for his actions which when considered by *itself* would have caused the same result as his discriminatory purpose." *King* v. *Laborers Local 818,* [443 F.2d 273, 279 (6th Cir. 1971)] (emphasis added). Stated otherwise, while Defendant may have had a valid economic reason for the elimination of a supervisory position in the laundry, it does not follow that the decision to terminate Mr. Grubb would have been reached despite Mr. Carl's unlawful animus.

Accordingly, I conclude that judgment must enter in favor of Plaintiff on the claim that the discharge was in violation of Title VII. . . . The single remark regarding age, however, does not persuade me that age was a casual factor in the action taken, particularly when considered with the fact that Ms. Fountain was approximately 63 years old at the time Mr. Carl selected her position for retention. I therefore find in favor of Defendant on the age claim. . . .

Grubb v. *W.A. Foote Memorial Hospital, Inc.*, 533 F.Supp. 671, 675 (E.D. Mich. 1981). It is possible, in hindsight, to question the factual findings made by the trial judge. However it is beyond question, in my judgment, that she concluded that while Grubb had not proved discrimination on account of his age, he had proved that he had been discharged because of his race. I think that there is substantial evidence, even in the majority opinion's summary of the evidence, to support this conclusion.

I find nothing in the record to indicate any predisposition on the trial judge's part toward the particular result which she [31] ultimately reached. On the contrary, she appears to have done exactly what she was expected to do: "decide which party's explanation of the employer's motivation [she] believes." *United States Postal Service Board of Governors* v. *Aikens,* 103 S.Ct. 1478, 1482 (1983). She considered the credibility of the many witnesses who testified; she weighed the evidence; she drew those inferences from the evidence which appeared to her to be most consistent with reality.

In short, I have concluded from examining the record that the issues in this appeal were primarily factual, and that Judge Boyle's finding of racially discriminatory intent as a casual factor in Grubb's termination was not clearly erroneous. Likewise, while her conclusions might have been more artfully expressed, they left no doubt that she believed, upon the evidence, that but for his race, Grubb would have remained in the employ of the Hospital.

With all due respect, it appears to me that the majority has done no more than re-try this case upon the record on appeal and has reached a different though perhaps equally plausible result. This, in my opinion, it is not our function to do. [32]

Nos. 82-1879/1888

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES H. GRUBB,
Plaintiff-Appellee,
Cross-Appellant,

v. **O R D E R**

W. A. FOOTE MEMORIAL HOSPITAL, INC., a Michigan corporation,
Defendant-Appellant,
Cross-Appellee.

Before: ENGEL and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

Upon referral to the original hearing panel, a majority of the panel, upon consideration, favors grant of the petition for rehearing, and

IT IS ORDERED that rehearing is granted and that the earlier opinion and judgment of the court reflected in *Grubb* v. *W. A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486 (6th Cir. 1984) is VACATED forthwith, and a judgment will enter affirming the judgment of the district court for the reasons set forth in the opinion filed herewith. Judge Weick dissents.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN
Clerk

Nos. 82-1879/1888

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES GRUBB,
Plaintiff-Appellee,
Cross-Appellant,

vs. **ORDER**

W. A. FOOTE MEMORIAL HOSPITAL, INC.,
a MICHIGAN CORPORATION,
Defendant-Appellant
Cross-Appellee.

The order of March 22, 1985 having been entered in error; it is

ORDERED that said motion is hereby vacated and held for nought.

ENTERED BY ORDER OF THE COURT

John P. Hehman, Clerk

/s/ LEONARD GREEN

By: Leonard Green
Chief Deputy Clerk

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

Nos. 82-1879, 82-1888

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES H. GRUBB,
Plaintiff-Appellee,
Cross-Appellant,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC., a Michigan corporation,
Defendant-Appellant,
Cross-Appellee,

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed April 16, 1985

Before: ENGEL and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

ENGEL, Circuit Judge, delivered the opinion of the Court. WELLFORD, Circuit Judge (p. 3) delivered a separate concurring opinion. WEICK, Senior Circuit Judge (pp. 4–5) delivered a separate dissenting opinion.

ENGEL, Circuit Judge. In *Grubb* v. *W. A. Foote Memorial Hospital, Inc.*, 741 F.2d 1486 (6th Cir. 1984), a majority of this panel, Judge Engel dissenting, directed the reversal of the judgment of the district court insofar as it had found [1] in favor of the plaintiff on his claim of racial discrimination and

granted monetary and other relief therefrom. In all other respects the judgment was affirmed but the cause was directed to be remanded to the district court for the dismissal of the plaintiff's complaint. A timely motion for rehearing en banc was filed, and voting on the petition en banc was suspended when it appeared that the panel was reconsidering its original position.

Having now reconsidered its position in the light of the petition filed, a majority of the panel concludes that the issues with respect to Grubb's claim of racial discrimination are primarily factual and that the determinations made by the trial judge finding that plaintiff had been discharged because of racial discrimination are not clearly erroneous. In view of the completeness of the statement of facts, which is already published, a majority of the court believes that they are sufficient to support such a finding. A majority of the court also concludes that the trial judge did not err in fashioning appropriate relief. Accordingly, the original judgment of this court is vacated and the petition for rehearing is granted. Upon reconsideration, the judgment of the district court is AFFIRMED. [2]

WELLFORD, Circuit Judge, concurring. I concur with the decision of Judge Engel, upon reconsideration, despite serious misgivings about the facts in this case. While I probably would have reached a different result with respect to the findings and conclusions made by the trial judge, it is she who had the responsibility to make the credibility determinations after an opportunity to assess the proof and evidence. I do not have the *conviction* after examining the record carefully that error has been committed and/or that an unjust result has been reached as does our brother, Judge Weick. [3]

WEICK, Senior Circuit Judge, dissenting: I adhere to the decision of this court, reported in 741 F.2d 1486 (6th Cir. 1984), in which a majority of the panel held that the findings

of fact of District Judge Patricia J. Boyle[1] relative to racial discrimination were not supported by substantial evidence and were clearly erroneous. Grubb filed a petition for rehearing with a suggestion that it be reheard en banc. A majority of the judges did not vote in favor of en banc consideration and the petition for rehearing was referred to the panel for determination. The panel then permitted the parties to file additional briefs with the result that Judge Wellford, who had signed the majority opinion, changed his mind and voted in favor of Judge Engel's opinion which granted the petition for rehearing, vacated the original judgment and affirmed the judgment of former District Judge Patricia J. Boyle. The short opinion of Judge Engel holds merely that former District Judge Boyle's findings of fact are not clearly erroneous and affirms her judgment which the previous panel had reversed. Since the majority has entered a new and different judgment from the one entered by the previous panel, does Foote Hospital have the right to file a petition for rehearing with the suggestion that it also be reheard en banc?

The majority has overlooked the fact that, originally, Grubb was not employed by Foote, but by Mercy Hospital. Foote purchased Mercy and no doubt intended to secure some savings in personnel thereby. It did not need two supervisors, Mrs. Fountain and Grubb. Accordingly, Foote's officials, Culhane and Peike, approved Carl's recommendation to dispense with the services of Grubb and to retain Mrs. Fountain, who had more experience at Foote than Grubb.

There was not an iota of evidence that any racial slurs were made by any official of Foote to Grubb. He testified [4] that only supervisor Carl made the slurs to him. District Judge

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[1] She is no longer a district judge of the Eastern District of Michigan but is now a state judge with the State Court of Michigan.

Boyle had authority to believe Grubb and not Carl, but Carl's slurs, even if made, were not binding on Foote. These slurs were not made by Foote's officials, Culhane and Pelke, or any other official of Foote, nor is there any proof that either of them or any other official of Foote Hospital had any knowledge of the alleged racial slurs made by Carl. It is very significant that Judge Boyle, in her findings of fact stated specifically with respect to both Culhane and Pelke: "I do not find, however, that the actions of either Mr. Culhane or Mr. Pelke is acquiescing in Mr. Carl's determination were prompted by discretionary motives." 533 F. Supp. 674.

Further, it is not understandable why Grubb, if Carl had made the alleged racial slurs to him, did not at that time or at any other time report them to Culhane and Pelke or to any other official of Foote, particularly when Grubb was discharged.

This supports the original panel's determination and clearly demonstrates that the holding of the majority of the present panel is not only unsupported but is ill-founded. Actually, it does nothing but affirm the ill-considered judgment of a district judge which unnecessarily soaked an eleemosynary institution with heavy damages in addition to ordering the reinstatement of an unneeded employee. [5]

Nos. 82-1879/1888

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES GRUBB,
Plaintiff-Appellee,
Cross-Appellant,

v. ORDER

W.A. FOOTE MEMORIAL HOSPITAL, INC.,
A MICHIGAN CORPORATION,
Defendant-Appellant,
Cross-Appellee

BEFORE: ENGEL and WELLFORD, Circuit Judges and WEICK, Senior Circuit Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en ganc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

Judge Weick would grant rehearing en banc for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ JOHN HEHMAN

John P. Hehman, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-1879
82-1888

CHARLES GRUBB,
Plaintiff-Appellee,
Cross-Appellant,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC.,
a Michigan corporation,
Defendant-Appellant,
Cross-Appellee.

Before: ENGEL and WELLFORD, Circuit Judges; and WEICK, Senior Circuit Judge.

JUDGMENT

UPON CONSIDERATION of the petition for rehearing en banc and supplemental briefs,

IT IS ORDERED that the original judgment of this court is vacated and petition for rehearing by the original panel is granted.

IT IS FURTHER ORDERED that the judgment of the said District Court is affirmed.

Supreme Court, U.S.
FILED
OCT 5 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-351

In the Supreme Court of the United States

October Term, 1985

CHARLES H. GRUBB,

Respondent,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In light of this Court's recent decision in *Anderson* v. *City of Bessemer City, North Carolina*, did the Court of Appeals correctly affirm the District Court's finding of fact that petitioner intentionally discriminated against respondent due to respondent's race?

2. Did the Court of Appeals correctly affirm the District Court's backpay award, inasmuch as petitioner never offered a job to respondent, petitioner failed to preserve the issue of mitigation for review or to present evidence related to mitigation at trial, and the District Court offset from the award all amounts respondent earned or could have earned in a subsequent non-equivalent job?

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No. 85-351

In the Supreme Court of the United States

October Term, 1985

CHARLES H. GRUBB,

Respondent,

v.

W. A. FOOTE MEMORIAL HOSPITAL, INC.,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Charles H. Grubb respectfully requests that this Court deny the Petition for Writ of Certiorari brought by W.A. Foote Memorial Hospital, Inc. seeking review of the Judgment of the United States Court of Appeals for the Sixth Circuit entered on April 16, 1985.

STATEMENT OF THE CASE

A. Introduction

Because the Petition before this Court is a challenge to the correctness of the District Court's factual finding of intentional race discrimination, and a challenge to the Court of Appeals' affirmance thereof, respondent believes it imperative that he clarify petitioner's selectively narrow statement of the case and record below.

This is an employment discrimination case which has been pending in the federal courts since February 16, 1979 when Mr. Charles H. Grubb, a black man, filed a complaint alleging that his former employer, W.A. Foote Memorial Hospital, Inc.,[1] discharged him due to his race in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ("Title VII").[2]

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[1] Petitioner will hereinafter be referred to as "Foote," "Foote East," "Foote West" or "the hospital."

[2] Grubb also charged Foote with unlawful race discrimination in violation of the Civil Rights Act of 1870, 42 U.S.C. §1981 ("§1981") and the Michigan Elliott-Larsen Civil Rights Act of 1977, M.C.L. 37.2101 *et seq.* ("Elliott-Larsen"). Grubb also alleged unlawful age discrimination in violation of the Age Discrimination In Employment Act of 1967, as amended, 29 U.S.C. §§621 *et seq.* ("ADEA"), and the Michigan Elliott-Larsen Civil Rights Act. Finally, Grubb alleged breach of an implied contract of employment pursuant to the Michigan common law doctrine set forth by the Michigan Supreme Court in *Toussaint* v. *Blue Cross and Blue Shield of Michigan*, 408 Mich. 579 (1980). (Joint Appendix, Vol. II, at 375-88.) (The Joint Appendix, as referenced herein and by the hospital in its Petition (at 14), is the record of the trial court filed by both parties in the Sixth Circuit. It will be identified herein as "J.App.")

When Justice O'Connor observed in *Ford Motor Co.* v. *EEOC*, 458 U.S. 219, 221 (1982), that the "extended time it frequently requires to obtain satisfaction in the courts" is especially unfortunate for the job discrimination victim who "cannot afford to stand aside while the wheels of justice grind slowly toward the ultimate resolution of the lawsuit," she could have been describing this case. It is now over eight years since the hospital fired Mr. Grubb because, as its decision-maker explained: "No black guy should be a boss over white women." During many of these years, the United States District Court for the Eastern District of Michigan and thereafter the Sixth Circuit subjected this case to a most exhaustive and exacting scrutiny.

"Court delays, of course, affect all litigants." *Ford*, *supra*, 458 U.S. at 221. Yet, the degree to which this case has been reviewed is ironic, given its straightforward nature. This case does not involve a novel or complex issue. The questions presented are not the subject of conflicting opinions in the various Courts of Appeals nor are they of significance to the administration of federal anti-discrimination laws. Indeed, the questions presented are *factual*, rather than *legal*, in character.

The ultimate factual issue the District Court decided was, quite simply, whether the hospital's decision-maker, Willard Carl, brought about Mr. Grubb's discharge by reversing the staffing recommendations of a study committee and selecting Mr. Grubb's job for elimination (as opposed to selecting the job held by a white employee) due to Mr. Grubb's race. After a five day bench trial, in which the District Court heard the testimony of many witnesses and accepted into the record hundreds of pages of documentary evidence, the District Court issued an opinion and order granting judgment in favor of respondent. *See* 533 F. Supp. 671 (E.D. Mich. 1981); Pet.

App. A.[3] By carefully weighing the credibility of each witness and reviewing the documentary evidence, the District Court found that the hospital had indeed discharged Mr. Grubb due to his race. It did exactly what it is that a District Court, sitting as the ultimate finder of fact, is supposed to do: decide whether the employer has engaged in intentional employment discrimination.

Mr. Grubb respectfully submits that there is no reason for this Court to grant the hospital's Petition, which the hospital itself conceded is based upon "reasonable surmise" (Pet. at 15). In essence, the hospital requests not only that this Court displace the District Court as the fact-finder, but also that this Court admonish the Sixth Circuit for refusing to do that very thing. The Petition should not be granted because the Sixth Circuit properly affirmed the District Court's judgment in accordance with the standard recently announced by this Court in *Anderson* v. *City of Bessemer City, North Carolina*, 470 U.S.____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985).

B. Factual and Procedural Background

In 1956, Grubb obtained a job in the laundry department of Sisters of Mercy Hospital ("Mercy") in Jackson, Michigan (J. App. 270-271). Although his initial job at Mercy was to pick up soiled linen (J. App. 272), by 1961 he had been promoted to the position of Laundry Manager. For two decades he enjoyed the support and respect of the Mercy administration (J. App. 279–280), and was acknowledged to be an accomplished professional in his field. 533 F. Supp. at 675; Pet. App. A-8.

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[3] References herein to "Pet. App." refer to the Appendix to the Petition for Certiorari.

As the Laundry Manager, he was assisted by Ms. Rosella Fountain, a white employee, whom he was instrumental in promoting through the ranks to the position of department supervisor (J. App.282). Fountain reported to Grubb and worked under his supervision and direction for 16 years (J. App. 280-281).

In September 1975, petitioner purchased Mercy, which became known as "Foote West," with the existing Foote facility becoming known as "Foote East" (J. App. 33). Petitioner eventually consolidated the staff and equipment of the two laundry facilities. Prior to this consolidation, the laundries ran independently with Willard Carl serving as the Laundry Manager at Foote East and Grubb serving as the Laundry Manager at Foote West (J. App. 283). Fountain remained the supervisor at Foote West where she continued to be Grubb's assistant (J. App. 284).

On December 1, 1975 Arthur Kneuppel, the hospital's president, selected a "Laundry Committee" composed of individuals he considered to be the most knowledgeable about laundry operations (J. App. 65). He appointed Grubb, Carl, and others to the Committee and requested that the Committee recommend a blueprint for consolidating the two laundry facilities (J. App. 64-66, 603).

On December 18, 1975 the Committee submitted a written report to the president (J. App. 66, 603) which recommended that the laundry facilities and staff at East and West be consolidated and centralized at East (J. App. 603). The report specifically recommended that the position of Laundry Supervisor (a position which existed only at Mercy and which was held by Fountain) be eliminated. The report also recommended that the management staff of the consolidated la ndry consist of one laundry manager and one assistant laundry manager (J. App. 66-69, 284-285, 603).

Grubb testified that as a result of the Committee report he believed and understood that he would be retained in the consolidated laundry operation in the position of Assistant Department Head (J. App. 285), i.e., assistant laundry manager. In fact, the hospital implemented many of the Laundry Committee's recommendations. Most pertinently, on April 4, 1976 the hospital's president appointed Grubb to the position of Assistant Department Head (J. App. 71-72, 783). The president also appointed Carl the Department Head of the consolidated laundry (J. App. 72). At the time, the laundry supervisor's position, held by Fountain, was not eliminated as recommended.

The hospital stipulated during trial that Grubb was qualified to hold every managerial position in the laundry (J. App. 781). Harold Petke (one of the hospital's Associate Administrators and Carl's immediate supervisor), who was familiar with Grubb's job performance at both Mercy and later at Foote, stated in an evaluation that Grubb "demonstrates exceptional technical and professional competence in all aspects of his work . . . and should be continued as a laundry manager" (J. App. 102-103). Thus, as both the District Court and the Sixth Circuit found, "[t]here [was] no dispute that during those years Mr. Grubb was an exemplary employee . . . qualified for the position of supervisor of the laundry," 533 F. Supp. at 673; Pet. App. A-3, whose "entire work record has shown an industry and determination to 'get ahead in the world' which one may rightly deem admirable." 741 F.2d at 1489; Pet. App. E-3.

Once Carl obtained supervisory power over Grubb, he proceeded to exercise his authority in a belittling, arbitrary and racially discriminatory fashion. He arranged for the termination of Grubb's employment; he also arranged for Grubb to be humiliated in the process.

Sometime before February 1977, Carl decided to fire Grubb. He ignored the staffing recommendations of the Laundry Committee and on his own initiative (J. App. 110) decided to eliminate Grubb's position rather than the position held by Fountain, the white employee (J. App. 45-47, 50-51, 220). Carl was able to do so by drafting a budget which reduced by one job the three existing supervisory staff positions in the consolidated laundry (J. App. 46-47, 49-50, 220). Carl's immediate supervisor, Petke, testified that the idea of eliminating the position held by Grubb originated with Carl (J. App. 110) who tried unsuccessfully to get Petke himself to eliminate Grubb's position (J. App. 291).

After Carl drafted a budget which eliminated Grubb's position, Petke asked him how he intended to fill the remaining supervisory staff position (J. App. 47-48). Carl told Petke that he had not yet decided, but would eventually do so based upon an "evaluation" of Grubb and Fountain, the two candidates for the position (J. App. 41-49). Carl's alleged "evaluation system" became the "articulated legitimate nondiscriminatory reason"[4] offered by the hospital at trial to explain Grubb's discharge. After Carl had selected Fountain for retention and Grubb for elimination (J. App. 228-230), he reported to Petke that he had "*compared both individuals using those criteria and Rosella Fountain came up higher*" (J. App. 55).

Although the hospital articulated this reason, the District Court found that Grubb had carried his ultimate "burden of persuasion" by proving, through both circumstantial and direct evidence, that the hospital's "criteria" were a pretext for intentional discrimination. The record established that *Carl never applied his criteria to Grubb*. In fact, at trial, the hospital

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[4] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981); *U.S. Postal Service Board of Governors* v. *Aikens*, 460 U.S. 711, 714 (1982).

was unable consistently to state the criteria in Carl's "evaluation system." According to Petke's testimony, Carl told him that his "evaluation system" contained six factors including the factor "working with the women directly" (J. App. 51). In contrast, Carl testified that he applied only three criteria to make the decision between Grubb and Fountain (J. App. 246-247); and, Carl admitted at trial that the "evaluation system" he employed contained factors different from those he identified in his deposition and different from those he told Petke that he had used (J. App. 233-236). What is more, during discovery the hospital claimed that the decision between Fountain and Grubb was made solely on the basis of seniority (J. App. 115-148) and in accordance with its personnel policy (J. App. 598). All of this evidence of "pretext" was presented to the District Court.

The hospital's "articulated reason" for the decision to fire Grubb, and each version of the criteria purportedly developed and applied by Carl in reaching his decision to fire Grubb, stand in stark contrast to Carl's own admissions at trial that: (1) he did not know whether Grubb had the ability or qualifications to meet the "criteria" he purportedly had devised (J. App. 233-234, 252); (2) he never asked Grubb if he could do or wanted the job (J. App. 236); and, most strikingly, (3) *he never applied his "criteria" to Grubb* (J. App. 251-252).

It was in the context of this collapsed offering of an "articulated reason" for Grubb's discharge — in conjunction with the hospital's admissions that Grubb was an employee of "exceptional technical or professional confidence in all aspects of his work" (J. App. 102-103) who was qualified for all managerial positions in the laundry (J. App. 781) — that the District Court found persuasive the following direct evidence that Grubb was discharged due to his race, and as a result of Carl's racial bias.

Beginning in March 1976 and continuing up to the very day of his discharge, Carl mounted against Grubb a campaign of humiliation. Carl tried to get Grubb to fire, for no lawful or apparently legitimate reason, three minority laundry workers. When Grubb refused to carry out Carl's demand, because the minority employees had done nothing to warrant discharge (J. App. 298), Carl sought to denigrate and embarrass Grubb by calling these employees "niggers," and saying to Grubb: "*When are you going to fire those niggers.*" (J. App. 298.)

Grubb testified that he was initially "so shocked that a man of Carl's stature would say that to me, I couldn't answer" (J. App. 298). Grubb testified that "nigger" was a term "ladies and gentlemen don't use" (J. App. 299). "That was wrong. You don't go out and call people that." (J. App. 298.) "I never considered myself one and I am glad I am not, but it's just something that nobody wants to be and I can't see anyone trying to make me be. . . ." (J. App. 299.)

Grubb advised Carl that black people "don't like to be called [niggers]"; to which Carl responded: "I don't care what they like to be called." (J. App. 298.) This testimony was specifically credited by the District Court as evidence of racial animus.

The hospital now requests that this Court grant its Petition for the purpose of reversing this credibility determination of the District Court. The hospital claims that the District Court gave too much weight to this racial slur because "it is doubtful that the court gave any serious consideration to the *undisputed and highly credible* testimony of. . . Lurlene Osborne" (Pet. at 15–16; emphasis added). The reality is to the contrary. Ms. Osborne was one of the minority employees who were the subject of Carl's epithet. The record established that the District Court was very interested in Osborne's testimony. Grubb testified that after Carl asked him "when are you going to fire

those niggers," he told Osborne that Carl was out to fire her (J. App. 327) and that Carl had used derogatory language in saying so (J. App. 299). On questioning from the District Court, Osborne *confirmed* Grubb's testimony:

> THE COURT: I would like to ask a question. *Do you recall Mr. Grubb having told you of derogatory remarks that Mr. Karl [sic] made about you?*
>
> MR. OSBORNE: *Yes.*
>
> THE COURT: And can you tell when that occurred, approximately?
>
> MS. OSBORNE: That was after we merged.
>
> THE COURT: But it was while Mr. Grubb was still with the hospital?
>
> MS. OSBORNE: *Yes. Mr. Grubb told me that Mr. Karl [sic] had told him that he should get rid of me. . . .*

J. App. 360–361; emphasis added.

Although Grubb was the Assistant Department Head, and was running the Foote West laundry, Carl chose to transmit his directives through Fountain rather than communicate with him directly (J. App. 288). Eventually, although Grubb had supervised Fountain for 16 years, Carl decided to upset this traditional reporting structure. One morning Carl advised Grubb that Fountain would henceforth report directly to him explaining to Grubb that: *"No black guy should be a boss over white women."* (J. App. 303.) The District Court also credited this as evidence of Carl's racial motive.

Petitioner now asserts that this Court should grant its Petition because Carl denied making this remark, and, in any case, because Fountain continued to report to Grubb. Petitioner's argument is disingenuous. This testimony was introduced to establish Carl's "state of mind." "The state of a man's mind is as much a fact as the state of his digestion."

U.S. Postal Service Board of Governors v. *Aikens*, 460 U.S. 711, 716 (1983). Carl was of the state of mind that black men should not supervise white women, and, as the District Court found, he eventually acted upon his racial beliefs by discharging Grubb. The fact that before he was fired Grubb continued to supervise Fountain is irrelevant. The issue was motivation and intent.

In addition, while Fountain reported to Grubb until both facilities were physically consolidated, Grubb also testified that Carl did effectuate what the District Court characterized as an "alteration in the line of authority," 533 F. Supp. at 674; Pet. App. A-4, by circumventing his supervision of the West facility:

> MR. GRUBB: [W]hat happened there is that Mr. Carl used to come over quite often but he wouldn't talk to me. He used to talk to Mrs. Fountain. He used to call on the telephone and talk to Miss Fountain but then she would come tell me so I never had much contact with him unless it was something that he wanted done right away, unless it was something like — once he came over and contacted me to try and take over for him but he was constantly in contact with Miss Fountain which was difficult for me to understand.
>
> * * *
>
> MR. GRUBB: I felt, as I had told you before, I felt left out. I didn't feel that we were dealing with each other on a manager to manager basis. I was ignored a lot. I was forgotten; I was placed in a predicament that caused me to be less than I was.
>
> * * *
>
> I came in one morning to work. I went to the office to see if there was anything special that I should do. You always

> check to see. You don't know what the night had done in a place like that and knowing there is nothing, I mean it is just normal things, I started out in the work room. He said to me, *"By the way, you report directly to me from now on. Miss Fountain will report directly to me from now on. No black guy should be a boss over white women."* That was a comment that disturbed me quite a bit. I had been over white women, they had been real ladies to me and real nice and there was no problem before whether she was white and whether I was black. We didn't believe that. The reason I don't believe that is that my mother was black and my father was white and to me, there was some of them in each one of us and when you put it together, you should really understand what it is.

J. App. 288, 303; emphasis added.

Carl's campaign of humiliation did not end here. Grubb was a man who cared deeply about his job which "represented the culmination of his life efforts." 533 F. Supp. at 676; Pet. App. A-8. Nevertheless, after Carl had made his decision, sometime before February 1977, to fire Grubb, he told Petke, Fountain and Culhane (the Corporate Director of Personnel) but he never told Grubb (J. App. 291-292) until July 8, 1977, the last day that Grubb was employed. On that day, Carl simply told Grubb: "You call this fired, or whatever you please. . . . You are done." (J. App. 291-292.)

During the five month interval between the time Carl decided to fire Grubb and had communicated his decision to others, and the day he actually told Grubb he was fired, Grubb became extremely anxious about his position. Rumors about his discharge were circulating back to him. These rumors, combined with Carl's treatment of him, predictably increased Grubb's anxiety. Although Grubb inquired about

the rumors, no one gave him an explanation (J. App. 291-292). As a result, Grubb was forced to suffer rumors of his pending termination for many months.

At trial, Carl was unable to offer *any* explanation for why he had failed to tell Grubb what he had told everyone else: that he had decided to fire Grubb. During trial, the District Court asked Carl why he had proceeded in this fashion, and Carl's response was indeed revealing:

> THE COURT: At some point you made a decision and you did not discuss it at that point with Mr. Grubb, is that correct?
>
> MR. CARL: Yes.
>
> THE COURT: Why would that have been?
>
> MR. CARL: I don't know. Several things I can remember, Your Honor. Mr. Grubb had pointed out to me verbally that he would be satisfied staying as laundry manager after consolidation. He didn't want to go anywhere else; he didn't want to do anything else. He was happy being laundry manager. In the new budget I did not have the laundry manager position.
>
> THE COURT: Well, you knew Mr. Grubb was interested, obviously, in the maintenance of that position?
>
> MR. CARL: Of the laundry manager, yes.
>
> THE COURT: Despite that, you made a judgment not to discuss the matter with him?
>
> MR. CARL: Evidently I didn't.
>
> THE COURT: Can you tell me why?
>
> MR. CARL: No, I really can't.

J. App. 257-258.

It was undisputed that Carl arranged a situation where for at least five months Mr. Grubb lived in constant fear that he would lose his job. Finally, having kept Grubb apart from the daily operations of the laundry by consigning him to oversee the closing of the laundry operation at Mercy, and having previously failed to advise Grubb of his imminent termination, Carl ordered Grubb's office converted into a lunchroom (J. App. 298). When Grubb returned he discovered that he no longer had an office (J. App. 288-289). This was the way Grubb first learned of his termination (J. App. 289). Grubb recalled: "Then I knew I had no office." (J. App. 290.) "There was no place for me to go. I wasn't questioned, I wasn't told anything." (J. App. 290.) "I was so hurt. I never been hurt like that before. It took me 60 years to get that job and they took it from me in six minutes. You just don't understand what that means." (J. App. 294.)

After five days of trial, in which the District Court heard the testimony and assessed the credibility of eight witnesses and reviewed hundreds of pages of documentary evidence, the court concluded that as a matter of "ultimate fact" the hospital had intentionally discriminated against Grubb due to his race. The District Court found that:

a. The decision as to which of two positions would be eliminated within the laundry where Grubb worked, ultimately rested with Carl;

b. Carl testified that he developed several criteria to determine whether to retain Grubb or Fountain the two employees that held the jobs Carl was considering;

c. Despite his testimony that he considered both Grubb and Fountain under the criteria he established, Carl admitted that he never applied the criteria to Grubb and did not make any attempt to determine whether Grubb could do the remaining job;

d. Carl told one of his superiors, long before he actually eliminated Grubb's position, that "there wasn't a place" for Grubb;

e. Carl exhibited animus toward Grubb because of Grubb's race;

f. Carl told Grubb to "fire them niggers" when referring to three black female subordinates who Carl wanted Grubb to fire because Carl believed they were union activists;

g. Carl altered the line of authority between Grubb and Fountain, and explained the reason to Grubb with the words: "A black man has no place supervising white women."

533 F. Supp. at 674; Pet. App. A-3-4.

The hospital appealed the District Court's finding of racial discrimination to the Sixth Circuit. On August 20, 1984, the judgment of the District Court was reversed by an opinion delivered by Senior Judge Weick, concurred in by Judge Welford, and dissented from by Judge Engel. 741 F.2d 1486; Pet. App. E 1-34 ("*Grubb I*").

Writing for the majority, Senior Judge Weick acknowledged that Grubb had established a *prima facie* case of race discrimination. 741 F.2d at 1493; Pet. App. E-13. However, Judge Weick asserted that the District Court placed too high a burden upon the hospital and gave "considerably greater weight to Grubb's testimony than was due." 741 F.2d at 1493-4; Pet. App. E-14. According to Judge Weick, even though the District Court specifically credited the testimony of Grubb, that evidence was *too weak* because "there is no other evidence in the record of racial bigotry on [Carl's] part." 741 F.2d at 1494; Pet. App. E-14. Judge Weick amazingly concluded that even though Carl may have referred to black

employees as "niggers," this was *weak* evidence of racially discriminatory animus because he wanted them discharged "*not because they were black* [emphasis in original], but because of their union activities, *albeit in a racially derogatory manner* [emphasis added]." 741 F.2d at 1497; Pet. App. E-21. And, even though the District Court found that Carl told Grubb that black men had no place supervising white women, that evidence of discriminatory animus was also too *weak* in Judge Weick's estimation to permit a finding of *racial* animus because "[e]ven if Carl told Mr. Grubb black men should not supervise white women, this statement had *no effect* on Grubb's position. . . ." 741 F.2d at 1497; App. E-22 (emphasis in original). According to Judge Weick, all of this credited direct evidence was insufficient to permit the District Court to conclude that "but for" Grubb's race, Carl would not have engineered his discharge.

On August 31, 1984 Grubb filed a petition for rehearing *en banc* of the panel's August 20, 1984 opinion. The petition was referred by the Sixth Circuit to the original hearing panel which, on April 16, 1985, vacated its earlier opinion and entered a judgment affirming the judgment of the District Court. 759 F.2d 546; Pet. App. F-1, H-1 ("*Grubb II*"). Judge Weick dissented.

REASONS FOR DENYING THE PETITION

A. The Court of Appeals' Decision Was Consistent With And Faithful To The Standard Of Appellate Review Announced By This Court In *Bessemer City*.

Respondent contends that the trial record was more than sufficient to support the trial court's conclusion that the hospital discharged Grubb because of his race. Respondent also contends that in *Grubb I*, Senior Judge Weick did exactly

what this Court in *Aikens* and *Bessemer City* stated a Court of Appeals may not do: he conducted "a *de novo* weighing of the evidence in the record." *Bessemer City*, *supra*, 84 L.Ed.2d at 529.[5] For Judge Weick, the bench trial was merely a "tryout on the road" and not "the main event." *Id.*

Dissenting in *Grubb I*, Judge Engel went to the heart of the problem:

> It is difficult enough to bring the reality of a complex human dispute such as this into the trial courtroom. It is even more difficult to reconstruct that reality from a transcript of the trial. It is this double removal from reality which makes the clearly erroneous rule so necessary a requirement of appellate review.
>
> * * *
>
> It is possible, in hindsight, to question the factual findings made by the trial judge. However it is beyond question, in my judgment, that she concluded that while Grubb had not proved discrimination on account of his age, he had proved that he had been discharged because of his race. *I think that there is substantial evidence, even in the majority opinion's summary of the evidence, to support this conclusion.*
>
> * * *
>
> In short, I have concluded from examining the record that *the issues in this appeal were primarily factual*, and that Judge Boyle's finding of racially discriminatory intent as a casual factor in Grubb's termination was not clearly erroneous. Likewise, while her conclusions might have been more artfully expressed, they left no doubt that she believed, upon the evidence, that but for his race, Grubb would have remained in the employ of the Hospital.

---

[5] *See also Pullman-Standard* v. *Swint*, 456 U.S. 273 (1982).

> With all due respect, it appears to me that *the majority has done no more than re-try this case upon the record on appeal and has reached a different though perhaps equally plausible result. This, in my opinion, it is not our function to do.*

741 F.2d at 1501, 1502, 1503; Pet. App. E-32, 33, 34 (emphasis added).

The panel's reversal in *Grubb II*, which affirmed the judgment of the District Court, followed *Bessemer City*, wherein this Court admonished:

> [The clearly erroneous] standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52 if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*" [citation omitted]. If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the "factfinder's choice between them cannot be clearly erroneous."
>
> * * *
>
> When findings are based on determinations regarding the credibility of witnesses, Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said.
>
> * * *

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one or two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

84 L.Ed.2d at 528-30.

In *Grubb II*, the Sixth Circuit (with Judge Weick dissenting) applied this standard of review in affirming the District Court:

> [T]he panel concludes that the issues with respect to Grubb's claim of racial discrimination are primarily factual and that the determinations made by the trial judge finding that plaintiff had been discharged because of racial discrimination are not clearly erroneous. In view of the completeness of the statement of facts, which is already published, a majority of the court believes that they are sufficient to support such a finding.

759 F.2d at 547; Pet. App. H-2.

To reverse the Sixth Circuit, which had before it such overwhelming evidence of discriminatory intent, and which faithfully applied the clearly erroneous standard as formulated in *Bessemer City*, would not advance the state of federal jurisprudence. Even if the Sixth Circuit's decision in *Grubb II* could somehow be distorted into a holding not in keeping with *Bessemer City* — which it cannot — that would still not be reason to grant the hospital's Petition. The Sixth Circuit simply *affirmed* a decision of the District Court which was itself not clearly erroneous.

It cannot be disputed that Grubb established a *prima facie* violation of Title VII. Even Judge Weick conceded as much in *Grubb I*. 741 F.2d at 1493; Pet. App. E-13. The hospital does not claim anything to the contrary in its Petition.

Once a plaintiff establishes a *prima facie* case in an employment discrimination suit, the defendant *must* present evidence in rebuttal. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 254 (1981). However, even though the defendant need only "articulate" a reason for its conduct, *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978); *Board of Trustees of Keene State Collete* v. *Sweeney*, 439 U.S. 25 (1978), its production obligation is not a meaningless standard. As this Court stated in *Burdine*:

> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate nondiscriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons. It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff. To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant.

450 U.S. at 254-255.

Given the record in this case, and particularly the hospital's admissions that it did not equally apply its selection crieteria to both the black and white candidates, the hospital failed as a matter of law to carry its rebuttal burden. The hospital thus failed to articulate a legally sufficient explanation for Grubb's discharge.

But the evidence here was much stronger. In fact, it proceeded to the level of specificity required to establish that Grubb carried his ultimate burden of persuasion under *Burdine*. Grubb established that the hospital's articulated reason

(i.e., the "Carl evaluation system") was unworthy of credence; that it was a sham and a pretext for intentional discrimination. In addition, Grubb established through direct evidence — *viz.*, Carl's expressed racial hostility and bigotry directed at the hospital's black employees in general and at Grubb as it specifically related to the maintenance of his position — that the decision-maker acted with a purposeful intent to discriminate. The evidence was more than sufficient under *McDonnell Douglas*, *Sweeney*, *Furnco*, *Burdine* and *Aikens*, to support the District Court's ultimate factual finding of intentional discrimination. Regardless of the review standard applied by the Sixth Circuit, its affirmance of the District Court's factual finding was not error.

B. Inasmuch As The District Court Offset Respondent's Award By All Amounts He Could Have Earned In A Position That Was Not Substantially Equivalent, That Petitioner Never Offered Respondent Any Job And Never Raised The Issue Of A Failure To Mitigate At Trial, The Court of Appeals' Affirmance Of The District Court's Relief Order Did Not Conflict With *Ford Motor Co.* v. *EEOC.*

In ostensible reliance upon this Court's decision in *Ford Motor Co* v. *EEOC*, 458 U.S. 219 (1982), the hospital contends that the Court of Appeals erred by affirming the District Court's award of back and front pay to Grubb subsequent to the time he resigned a job he obtained following his discharge by the hospital. The hospital bases its argument upon two factual claims: First, that "Mr. Grubb voluntarily terminated his subsequent employment *for the sole purpose* of collecting Social Security" (Pet. at 19; emphasis added), and second, that "the intent of Mr. Grubb to remain unemployed *is beyond dispute*" (Pet. at 20; emphasis added).

Both factual assertions are false. The *only* testimony on this subject was that provided by Grubb, which is quoted in its entirety in the Petition (at 21). Grubb testified not just that continuation of employment with Jackson County would have resulted in reducing his Social Security benefits, but moreover that he "*wasn't making enough money for the requirements of the job*" (Pet. at 21; emphasis added).

Contrary to the hospital's assertion (Pet. at 20), the evidence did not establish that Grubb intended to remain unemployed. Grubb testified that he was able and willing to return to work with the hospital, and the District Court so found. 533 F. Supp. 676; Pet. App. A-9. In addition, the District Court correctly noted that the Social Security Act, 42 U.S.C. §403, contemplates that beneficiaries may continue to work after the election of benefits. Pet. App. B-2. Respondent is aware of no authority, and petitioner cites no authority, that such an election serves to terminate back pay entitlement under Title VII.

However, even if petitioner's characterization of the record had been accurate, its reading of *Ford Motor Co.* v. *EEOC* is flawed and its reliance thereon is misplaced. In *Ford* this Court held that an employer can toll its back pay liability under §706(g) of Title VII by "*unconditionally offering the claimant the job he sought.*" 458 U.S. at 232 (emphasis added). That holding is inapplicable here. The hospital never offered to Grubb, unconditionally or otherwise, the job from which he was discharged. It never offered him any job. Indeed, in 1979, two years after Grubb was discharged, Carl resigned his position with Foote, creating a vacancy in the laundry manager's position. Yet the hospital failed to offer the job to Grubb. 533 F. Supp. at 673; Pet. App. A-3.

Ford is also not applicable here because it only applies to positions which are "substantially equivalent." 458 U.S. at 232. After he was discharged by the hospital, Grubb sought to mitigate his damages by searching for employment. Although

he did not find a comparable position, he did accept a job with Jackson County. But, the Jackson County job paid Grubb only 65% of what he would have earned at Foote had he not been discharged, and only 71.2% of what he had earned at Foote a year earlier (J. App. 621). Positions with such disproportionate compensation are not "substantially equivalent." *Rasimas* v. *Michigan Dept. of Mental Health*, 714 F.2d 614, 624 (6th Cir. 1983), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2151 (1984). As a matter of law, Grubb's resignation from a non-equivalent position did not disenfranchise him from all future relief. "Claimants often take other lesser or dissimilar work during the pendency of their claims, even though doing so is not mandated by the statutory requirement that a claimant minimize damages or forfeit his right to compensation." *Ford*, *supra*, 458 U.S. at 231 n.14.

After his discharge Grubb searched for employment. At the age of 62, he went beyond what the law required: he accepted a non-comparable position. The purposes of Title VII are "to end discrimination" and, secondarily, "to compensate the victims for their injuries" by restoring them "'so far as possible. . . to a position where they would have been were it not for the unlawful discrimination.'" *Ford*, *supra*, 458 U.S. at 230, citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1972). Those purposes were served in *Ford*, this Court concluded, because unconditional offers of reinstatement to the job at issue would place "the victims of employment discrimination into the jobs they deserve as quickly as possible." 458 U.S. at 241. No such purpose, nor indeed any purpose of Title VII, would be served by depriving discrimination victims of relief because they left a job they never had to accept in the first place. Such a rule would encourage victims not to accept any job that was not substantially similar.

In any case, petitioner is here precluded from raising the issue of mitigation for it waived that issue at trial. While a Title VII plaintiff bears the burden to use reasonable efforts to

mitigate his damages *the burden is always on the defendant to prove a failure to mitigate. Rasimas, supra,* 714 F.2d at 623-624. Moreover, under Federal Rule of Civil Procedure 8(c), the defendant must plead failure to mitigate as an affirmative defense or the same is waived. *Camalier & Buckley-Madison, Inc.* v. *Madison Hotel, Inc., et al,* 513 F.2d 407, 420 n.92 (D.C. Cir. 1975). The hospital here failed to raise this defense at or before trial, and is accordingly barred from raising it now.

Even assuming that it did not waive the issue, the hospital failed to carry its burden to establish a failure to mitigate. Grubb testified that he left the job at Jackson County because he found the wages insufficient. It was undisputed that the Jackson County position paid substantially less in 1978 than he made in his position at Foote a year earlier. This was the *only* testimony regarding his reasons for resigning this position. The hospital pursued the matter no further. As the District Court noted, petitioner "had one full and fair opportunity at the trial to produce evidence of failure to mitigate" (J. App. 587).

In the final analysis, though, petitioner's argument is moot. Despite petitioner's failure to raise the issue, the District Court, on its own initiative, found a failure to mitigate and reduced Grubb's back and front pay awards accordingly. The District Court held in its Memorandum Opinion And Order On Damages (Pet. App. B-1) that:

> I find that amounts earnable at Jackson County were "amounts earnable with reasonable diligence by the person or persons discriminated against." 42 U.S.C. §2000e5(g). While the burden of proving a failure to mitigate rests on Defendant, I find that where, as here, Plaintiff's own proofs show that he secured and then terminated his subsequent position in order to receive social security benefits, the record supports a conclusion that

> Plaintiff failed to mitigate. Therefore amounts which Plaintiff could have earned had he continued in that employment must be deducted from the ultimate award.

Consequently, in both its back pay and front pay awards, the District Court *reduced* Grubb's damages by the amount of pay the District Court determined that Grubb would have earned had he remained in his job at Jackson County. Specifically, the District Court deducted $12,750.40, the amount it found he could have earned per year at Jackson County, from the amount of lost wages the District Court determined he suffered each year. It did so because of Grubb's purported failure to mitigate, despite the fact that the Jackson County job paid him substantially less than he would have earned with petitioner, and despite the fact that in September 1979, a year *after* Grubb left his job at Jackson County, the hospital's laundry manager position became vacant and the hospital failed to offer the job to Grubb. This failure, the District Court noted in its opinion, was a violation of the hosptial's applicable personnel policy. 533 F. Supp. at 673; Pet. App. A-3.

Because the hospital should have recalled Grubb in 1979, *after* he left the Jackson County job, he should not have had any amounts deducted from his backpay award after that date. Nevertheless, while the District Court found that Grubb had suffered an actual loss of $99,569.00 in wages, from the date of his termination to the date of judgment (Pet. App. D-1), it reduced this award by $41,880.00, the amount it found Grubb would have earned had he not resigned the Jackson County job. The same reduction was ordered for Grubb's front pay (Pet. App. D-4).

The hospital received every conceivable benefit of the District Court's mitigation decision. Not only were all wages actually earned by Grubb offset from his backpay award, but

"constructive" *non-earned* wages were also deducted. Mitigation is an issue of fact which, on appeal, is subject to the Rule 52(a) "clearly erroneous" standard of review. The District Court's mitigation ruling turned on the unique facts of this case. There is no sound reason for this Court to grant the Petition on this issue.

CONCLUSION

Mr. Grubb respectfully requests that the hospital's Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 85-351

In the Supreme Court of the United States

OCTOBER TERM 1985

CHARLES H. GRUBB
Respondent,
v.
W. A. FOOTE MEMORIAL HOSPITAL, INC.,
Petitioner.

REPLY BRIEF OF PETITIONER

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INTRODUCTION

The most telling aspect of the Brief for Respondent in Opposition to Petition for Writ of Certiorari is that not once has the Respondent disputed the existence of the material factual error upon which the district court premised its finding of racial animus and upon which the Petition is based.* Rather, the Respondent has transparently attempted to obfuscate the relevant issues at hand by selectively summarizing and edi-

* The Respondent has, however, done the Petitioner a disturbing disservice by citing out of context a portion of the Petition, when he argued that the Petitioner has conceded that the Petition is based upon "reasonable surmise." At page 15 of the Petition, the Petitioner only stated that "One can reasonably surmise that these clearly erroneous findings also tainted the trial court's perception and treatment of other evidence introduced at trial." The errors discussed in the Petition are certainly not the by-product of surmise. They are amply disclosed by an objective review of the record.

torializing *other* portions of the trial record that, when viewed in isolation, arguably might have supported a finding of race discrimination.

Yet, there is absolutely no reason for either the Petitioner or this Court to address the issue of whether one permissible view of the evidence would have permitted a finding of discrimination. Indeed, as will be discussed more fully below, the Court may assume arguendo that one permissible view of the evidence would have allowed a finding of discrimination.

The issue before the Court is whether the trial court's selection of one permissible view, to the exclusion of another, based upon undisputably erroneous factual findings, compels a reversal of the judgment below. Under the circumstances of this case, that question can be answered only in the affirmative.

ARGUMENT

The Judgment Below Must Be Reversed Since The District Court Unquestionably Selected One Of The Two Permissible Views Of The Evidence On The Basis Of Its Clearly Erroneous Factual Findings

The Respondent has made no effort, whatsoever, to dispute the existence of the material factual error upon which the district court unquestionably premised its finding of racial animus and which has been discussed at length in Foote Memorial's Petition for Writ of Certiorari. The erroneous finding, as well as the context in which it was applied by the district court, can be summarized as follows:

1. The district court found as an "undisputed" fact tha the Respondent's supervisor, Willard Carl, directed the Respondent's subordinate, Rosella Fountain, to report

directly to him rather than to the Respondent. 533 F. Supp. 671, 674 (E.D. Mich. 1981), App. A-4. This factual finding was not only unsupported but entirely contradicted by the trial record.

2. On the sole basis of the court's mistaken belief that there existed some evidence to the effect that Mr. Carl had actually directed Mrs. Fountain to report directly to him rather than to the Respondent and that such evidence had gone entirely undisputed, the court credited the Respondent's testimony that "Mr. Carl's expressed reason for this alteration in line of authority was explained to plaintiff in the following words: 'a black man has no place supervising white women.' " *Id.*

3. The district court found, in turn, that the Respondent's credited testimony concerning the remark at issue, together with another alleged slur, "establishes that the basis for the animus was Mr. Grubb's race and/or age." *Id.*

The error prompted the majority in *Grubb I*, which included Judge Wellford, to find that "it appears that the District Court based its decision, to credit Grubbs' testimony that Carl directed Mrs. Fountain to report to him because '[a] black man has no place supervising white women,' on an erroneous finding." 741 F.2d 1486, 1497 (6th Cir. 1984), App. E-21, 22.

Significantly, the majority in *Grubb II* which also included Judge Wellford, did not purport to challenge the cited finding of clear error. Nor did it question the materiality of the error. *See generally*, 759 F.2d 546 (6th Cir. 1985), App. H. The majority in *Grubb II* opted instead to ignore and disregard the material error, while holding that "[i]n view of the completeness of the statement of facts, which is already published, the majority of the court believes that they are sufficient to support. . ." the finding of racial discrimination. 759 F.2d 547, App. H-2.

In *Anderson* v. *City of Bessemer City*, 470 U.S.____, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985), this Court held that "[w]here there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous." 105 S.Ct. at 1512. The majority in *Grubb II* has taken this holding one step further and held that where there are two permissible views of the evidence, the fact finder's choice cannot be clearly erroneous, *even if the fact finder's choice is based upon clearly erroneous findings.*

Such a ruling would have been proper only had the majority in *Grubb II* concluded that the trial record permitted only one view of the controlling factual issue, with that view being that the Respondent was discriminated against due to his race.

This case, however, did not involve just one permissible view of the evidence. Both members of the majority in *Grubb II* have acknowledged that there are two permissible views of the evidence: one permissible view being that Willard Carl was motivated by racial animus and the other equally permissible view being that Mr. Carl's decision to eliminate the Respondent's position was not motivated by racial animus. In his dissent to the majority opinion in *Grubb I*, Judge Engel found that:

> The motives behind the Hospital's action in discharging Charles W. Grubb were probably mixed, and it is possible to draw a number of differing and even conflicting inferences from the proof. The discharge may have been prompted by a business necessity, by animus against Grubb because of his personality, or by a deep seated resentment against him because of his advanced age or race. As the facts recited in the majority opinion make clear, there was evidence from which any of the foregoing conclusions could have been reached by the trial judge. . .

741 F.2d 1502, App. E-32.

Similarly, in his *Grubb II* concurrence, Judge Wellford remarked:

> I concur with the decision of Judge Engel, upon reconsideration, despite serious misgivings about the facts in this case. While I probably would have reached a different result with respect to the findings and conclusions made by the trial judge, it is she who had the responsibility to make the credibility determination after an opportunity to assess the proof and evidence.

759 F.2d 547, App. H-2.

Whether the trial court *would have*, as opposed to *could have*, arrived at the same conclusion, absent its misperception of the evidence, is unknown. What is known is that the trial court chose between the two permissible views of the evidence for clearly erroneous reasons.

Given its opinion that the district court would have been entirely justified in finding that no discrimination took place, the majority in *Grubb II* had no basis or authority to fill the factual void created by the district court's error. At the very least, the court of appeals was obligated to remand this matter to the district court for further proceedings as to the issue of racial animus. As this Court held in *Pullman-Standard* v. *Swint*, 456 U.S. 273(1982):

> When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings:
>
> > '[F]actfinding is the basic responsibility of the district courts, rather than appellate courts, and. . . the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court.' *DeMarco* v. *United*

States, 415 U.S. 449, 450. . .(1974).

Likewise, where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue*. *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318, 331-332 (1974). All of this is elementary.

456 U.S. 291-292. (Emphasis supplied)

The irony of *Grubb II* is that, in applying the standards of appellate review set forth in *Anderson* v. *City of Bessemer City* and purporting to disavow any authority to substitute its judgment for that of the district court with respect to which of the two permissible views of the evidence should prevail, the majority did, in effect, substitute its judgment for that of the district court. The district court alone has the authority to determine anew whether in the absence of erroneous factual findings, Willard Carl's actions were prompted by discriminatory animus.

The issues raised by the petition are not, as the Respondent would have this Court believe, primarily factual rather than legal. The Petitioner is not requesting that the Court choose betweeen one of two or more permissible views of the evidence. The Petitioner seeks only to have the Court review and reverse the *Grubb II* majority's decision to do so.

Where a trial court specifies the particular factual findings upon which its finding of racial animus is premised and those findings prove to be entirely erroneous, the finding of racial animus cannot and should not be affirmed simply because other evidence might have arguably supported such a conclusion. To the extent that the majority in *Grubb II* has viewed and applied the standard of appellate review differently, it has committed clear legal error. At the same time, the published opinion in *Grubb II* creates dangerous precedent, especially when read together with the published opinion in *Grubb I* by the same panel of judges.

The opinion in *Crubb II* provides this Court with a perfect vehicle, as well as a compelling reason, to clarify further both the proper and necessary scope of appellate review under the clearly erroneous standard, in the wake of *Anderson* v. *City of Bessemer City*.

Respectfully submitted,

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